

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

- - - - - X
DUSTIN BURNIKEL, :
 :
Plaintiff, : Case No. 4:15-cv-00050
 :
vs. :
 :
MICHAEL FONG, individually :
and in his official capacity :
as a law enforcement officer :
with the Des Moines Police :
Department; GREG WESSELS, :
individually and in his :
official capacity as a law :
enforcement officer with the :
Des Moines Police Department; :
and the CITY OF DES MOINES, : TRANSCRIPT OF TRIAL
IOWA, : VOLUME I
 :
Defendants. :
- - - - - X

First Floor, North Courtroom
United States Courthouse
123 East Walnut Street
Des Moines, Iowa 50309
Tuesday, November 13, 2018
8:33 a.m.

BEFORE: THE HONORABLE REBECCA GOODGAME EBINGER, Judge.

TERRI L. MARTIN, CSR, RPR, CRR
515.689.6444

APPEARANCES:

For the Plaintiff:

JAMES R. WYRSCH, ESQ.
JAVAD M. KHAZAELI, ESQ.
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St. Louis, Missouri 63101

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For the Defendants:

JOHN O. HARALDSON, ESQ.
Assistant City Attorney
City of Des Moines
400 Robert D. Ray Drive
Des Moines, Iowa 50309-1891

I N D E X

WITNESSES:DIRECTCROSSREDIRECTRECROSSFor the Plaintiff:

Breanna Hunemiller

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Darrick Burnikel

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1 P R O C E E D I N G S

2 (In open court.)

3 THE COURT: Thank you. Please be seated.

4 Good morning.

5 We're here in the matter of Dustin Burnikel versus
6 Michael Fong, Gregg Wessels, and the City of Des Moines. This
7 is Case No. 4:15-cv-50. This is the time and date set for trial
8 in this matter. As you know, my name is Rebecca Goodgame
9 Ebinger, and I'm the district judge who's been assigned to
10 preside.

11 If counsel would make their appearances for the day.

12 MR. KHAZAELI: Your Honor, Javad Khazaeli for the
13 plaintiff.

14 MR. WYRSCH: James Wyrsh for plaintiff, Your Honor.

15 MR. SWAIM: Justin Swaim for the plaintiff, Your
16 Honor.

17 MR. HARALDSON: John Haraldson for the defendants,
18 Your Honor.

19 THE COURT: Thank you.

20 Mr. Khazaeli, I recall you stating previously that you
21 thought you might have another attorney present. Do you intend
22 to have that fourth attorney present throughout this trial?

23 MR. KHAZAELI: Yes, Your Honor. She's here in
24 attendance, but she will not be participating in the trial.

25 THE COURT: Thank you.

1 I have a number of topics I wanted to discuss at this
2 conference, and then I'll open the floor to issues that you need
3 to bring to the Court's attention.

4 The first is I mentioned at our final pretrial
5 conference two weeks ago that I would like a list of witnesses
6 and subjects of testimony to be able to read to the parties. I
7 don't know that I saw anything from you in that regard. Is
8 there anyone, other than the witnesses listed, that you believe
9 will be mentioned during the course of the trial that the Court
10 should inquire as to the jurors' knowledge of those individuals?

11 Mr. Khazaeli?

12 MR. KHAZAEI: No, Your Honor.

13 THE COURT: Mr. Haraldson?

14 MR. HARALDSON: There was a list of potential people
15 that we sent to the defendant [sic], but they're going to be
16 very tangentially related, mentioned in the documents
17 tangentially but not testifying. So I don't have a concern.

18 THE COURT: Okay. My concern is that someone is
19 talking about someone tangentially, John Smith, who happened to
20 be there, and it turns out that juror No. 6 John Smith is her
21 cousin, right. So if you all are not concerned that there's
22 anybody in the trial that is -- other than the witnesses slated
23 to testify that the Court needs to inquire about, we're just
24 going to make a record about that right now.

25 Mr. Khazaeli, are you comfortable with that?

08:36:27 1 MR. KHAZAELI: I am, Your Honor.

08:36:28 2 THE COURT: Mr. Haraldson?

08:36:30 3 MR. HARALDSON: Yes, Your Honor.

08:36:31 4 THE COURT: So the Court will read off a list of the
08:36:33 5 witnesses and say that they're potential witnesses and ask if
08:36:37 6 anyone knows them.

08:36:39 7 As to phase two, I would like a proposed statement of
08:36:46 8 the case for phase two. The Court, and I'll address this
08:36:52 9 further later, is going to allow the issue of punitives damages
08:36:58 10 to be addressed in phase two, and the other issue will be the
08:37:01 11 liability of the City. I didn't see a proposed statement of the
08:37:04 12 case that covers that. My intent will be should phase two be
08:37:08 13 necessary, we will have a kind of preliminary set of
08:37:17 14 instructions that explains to them what we're doing, and that
08:37:19 15 will include the statement of the case and some instructions
08:37:24 16 dealing with the materials that are going to be addressed in
08:37:26 17 that. If you could please file a proposed joint statement of
08:37:31 18 the case for phase two, I would appreciate that.

08:37:35 19 As to the punitive damages issue, I don't think I
08:37:40 20 received anything from the defense in regards to that.

08:37:43 21 Mr. Haraldson?

08:37:45 22 MR. HARALDSON: That's correct, Your Honor.

08:37:48 23 THE COURT: Okay. And at the final pretrial
08:37:49 24 conference, we talked about allowing supplemental briefing in
08:37:51 25 regard to punitive damages. The defense had changed their

position as to the propriety of having the issue addressed in the phase two. The Court concurs with the plaintiff's proposal to present evidence of punitive damages during the second phase of the trial. I've heard nothing in response from the defense that would counter the arguments made by the plaintiff. The authorities cited by the plaintiff in their briefs in regards to addressing punitive damages during the second phase are on point and persuasive. *Payne versus Jones* from the Second Circuit and *Williams versus ConAgra Poultry Company* here in the Eighth Circuit support this approach.

We will need to discuss what parts of the prior bad acts are appropriate. The case law suggests that it needs to be similar in kind, and some of the materials that have been put forth in terms of, for example, accessing an appropriate material while on the job would seem to fall outside the scope of the permissible authorities for that purpose; but we can address that more subsequently.

But for purposes of understanding where the Court is, the Court does find that the prior acts of Officers Fong and Wessels have some relevance to the punitive damage claim and are also relevant to the plaintiff's claims against the City and that promoting judicial economy and efficiency is served by putting forth those pieces of evidence during the second phase of the trial.

In terms of any problems in terms of confusion or

1 issues, those can be addressed in the instructions and in a
2 properly worded verdict form.

3 Any additional record in that regard from the
4 plaintiff?

5 MR. KHAZAEI: No, Your Honor.

6 THE COURT: From the defense?

7 MR. HARALDSON: No. Your Honor, one concern that I
8 have in my proposed jury instructions is in phase one the jurors
9 determine the issue of whether punitive damages are proper in
10 phase one and then make the "yes" or "no" determination. If, of
11 course, they say yes, then it moves on obviously to phase two
12 for the actual damages of punitives because I believe that the
13 nature of the acts of the officers and being reckless or willful
14 is the primary question about whether punitives are proper in
15 respect to this case.

16 So that's why in my proposed jury instructions I had a
17 question for the jurors with regard to each claim of whether
18 punitive damages should be provided. The issue of what those
19 damages should be would be addressed in phase two if the jurors
20 say yes in phase one.

21 THE COURT: Response from the plaintiff?

22 MR. WYRSCH: Your Honor, I don't think the case law we
23 cited makes a distinction between those two things, and I think
24 unless we're entitled to get into those other acts in the first
25 phase, we think that -- which we're happy to do; but if we're

1 going to decide the question of punitive damages, then they
2 should be decided altogether in phase two.

3 THE COURT: So the Court will -- we haven't made our
4 record on the final instructions. I understand your position,
5 Mr. Haraldson, on that. The factors determining the extent of
6 the punitive damages are certainly different than whether or not
7 they're eligible for punitive damages; but I'll consider that,
8 and we can make a record on that at the time we're considering
9 final instructions.

10 MR. HARALDSON: Thank you.

11 THE COURT: Thank you for bringing that distinction to
12 my attention.

13 The plaintiff brought up *Baldwin versus Estherville*.
14 While that may be new to attorneys from Missouri, it is not new
15 to anyone in Iowa. This Court has been living with *Baldwin* and,
16 before *Baldwin*, *Godfrey* for years now. The fact that the week
17 before trial you found this does not change the fact that
18 there's no Iowa Constitutional claim in the complaint, and the
19 Court sees that there's nothing that we need to address at this
20 time. While I appreciate your review of the Supreme Court case
21 law, I don't see how that has any relevance to the case we have
22 before us.

23 Any additional record in that regard?

24 MR. WYRSCH: No, Your Honor.

25 THE COURT: Thank you.

1 We provided preliminary instructions previously, and
2 there were no objections. Our intent is to provide those to the
3 jury and read those before openings. Any objections to either
4 the preliminary instructions or the timing of those?

5 MR. KHAZAEI: No, Your Honor.

6 MR. HARALDSON: No, Your Honor.

7 THE COURT: Thank you.

8 And, finally, final instructions -- I think I covered
9 this at the last final pretrial conference -- we will work on
10 those throughout the course of this trial. They need a lot of
11 work. A couple of things that I wanted to ask you about first.
12 You proposed a couple of instructions that were to be used
13 during the course of trial. One of them was a stipulated facts
14 instruction. What is your intent as to when you're asking the
15 Court to provide that instruction? And are you also asking for
16 it to be in writing at the close of trial as well?

17 On behalf of the plaintiff?

18 MR. KHAZAEI: I think we would defer to the Court on
19 that; but I think if we are providing it to the jury, it makes
20 sense to do that as early as possible.

21 THE COURT: Okay. Mr. Haraldson?

22 MR. HARALDSON: I don't have an objection with
23 providing it early.

24 THE COURT: Okay. It is not in the preliminary
25 instructions because it wasn't proposed in the preliminary

1 instructions. My intent would be, before the start of the
2 plaintiff's case, to simply read that instruction in total, and
3 then I will also include it in the final instructions as a
4 separately numbered instruction.

5 Any objection to that?

6 MR. KHAZAELI: No, Your Honor.

7 MR. HARALDSON: No, Your Honor.

8 THE COURT: If I forget, please remind me.

9 Similarly, the limiting instruction about Mr. Wessels'
10 credibility, is there a particular piece of evidence that you
11 want me to -- do you know when this is going to arise? And is
12 there a manner in which you have intended to have that provided?

13 MR. WYRSCH: Your Honor, I think your motions in
14 limine resolve that issue.

15 THE COURT: Okay. Well, good.

16 MR. WYRSCH: That would be we would not need the
17 instruction.

18 THE COURT: Okay. Generally speaking about the
19 instructions, my intent will be to work on them internally in
20 chambers. I will then give you a draft of the Court's proposed
21 instructions which will kind of synthesize the different
22 positions that you all have put forth. We will then have a
23 conference among ourselves off the record about the
24 instructions. I'll make any changes that I feel appropriate
25 based on that conference. I'll then give you another set and

1 then, if necessary, we'll have another off-the-record
2 discussion. And then when the Court has a set that I believe is
3 the final version, we'll make a record as to any objections that
4 remain to those or the fact that no objections exist before we
5 provide them to the jury.

6 It's also my practice to read final instructions
7 before closing arguments. I find it's more helpful to the jury.
8 Instead of you saying the Court is going to instruct you, you
9 can actually refer to the instructions.

10 Any objection to proceeding that way?

11 MR. KHAZAELI: No, Your Honor.

12 MR. HARALDSON: No, Your Honor.

13 THE COURT: Okay. Those are all of the things that I
14 had.

15 Anything that the plaintiff needs to bring to the
16 Court's attention before we proceed?

17 MR. KHAZAELI: Yes, Your Honor. We had a question
18 that we wanted to raise about one of -- at least one of the
19 stricken proposed questions to the jury.

20 THE COURT: Okay.

21 MR. KHAZAELI: The first one I wanted to raise,
22 there's a line of questioning on plaintiff's proposed voir dire
23 questions starting at question -- it's questions 24 and 25.

24 THE COURT: Yes.

25 MR. KHAZAELI: So the reasons we added those

08:47:18 1 questions, Your Honor, is during our deposition of the
08:47:21 2 defendants' expert witness, repeatedly as we proposed
08:47:24 3 hypotheticals or asked the expert about how the defendant should
08:47:31 4 have been treated based on their history of findings of
08:47:37 5 inappropriate action, the expert consistently came back to,
08:47:41 6 well, you know, police unions make you do something. Sometimes
08:47:48 7 as a manager, we can't do anything because the police union
08:47:51 8 forces us to keep people. The police union prevents us from
08:47:55 9 disciplining people. That's why we put that in there.

08:47:57 10 If the Court doesn't believe that that's something we
08:48:00 11 should be getting into, then we would ask the Court to limit the
08:48:03 12 expert's ability to use the fact that a police union exists as
08:48:09 13 an excuse for the police department not taking action that we
08:48:14 14 think is appropriate. That's why we placed that in there.

08:48:17 15 So we would defer to the Court as to which one you
08:48:21 16 think is better for judicial economy, whether we limit the
08:48:24 17 expert from being able to get into those types of things, which
08:48:28 18 we believe actually was kind of conjecture. He didn't know
08:48:31 19 anything about the specific police union here in Des Moines.
08:48:35 20 But if he's allowed to go there, we do think that's very
08:48:38 21 important for us to know about the jury's opinions on that.

08:48:41 22 THE COURT: Thank you very much. I appreciate that
08:48:42 23 context.

08:48:43 24 Mr. Haraldson, response?

08:48:44 25 MR. HARALDSON: Well, those are responses from

specific questions from plaintiff in deposition. It's a difficult situation for cities. Obviously, this is a negligent retention case. There are aspects that come into the ability of a supervisory body that's being held for liability for the purpose of they operate under a collective bargaining agreement and have a civil service organization. I don't think that's necessarily irrelevant for a city to know. However, it's more of a -- it is -- I do believe that it is fair to say that Dr. Peters, when he was asked that question, was talking in generalities. He does not know the specifics of the Des Moines Police Union any more than he probably knows other cities other, than the fact that most police officers in major cities have unions.

So I think there's some relevance to it. However, I don't believe it's a major issue in this case as far as the aspect of the City's ability to supervise, the liability.

THE COURT: So, clearly, I didn't know that when I read your proposed voir dire. I appreciate that context. So I think that the follow-up question, "Do you have any specific opinions on a union's role in the employee discipline and determination process" is too pointed. But if you want to ask the two questions in 24 and 25, "Do you have any opinions about police unions, do you have any opinions about unions generally," that's fine in light of the context you've provided. I don't think that follow-up about the roles of employee discipline and

1 termination process, because we don't know what you said to me
2 means that this was conjecture that this individual had. I
3 think that gets too far into the weeds; but those two general
4 questions are acceptable to the Court.

5 MR. KHAZAELI: Thank you, Your Honor.

6 And then for defendants' questions, there were two
7 that the Court allowed in that we wanted to flag: Question
8 number 36 being the first one. "Do any of you think that a
9 police officer must endure and allow disobedience to lawful
10 police orders?"

11 THE COURT: Okay.

12 MR. KHAZAELI: I think we've got a problem
13 understanding -- I think that that's confusing. What is
14 disobedience? What is a lawful police order? This is kind of
15 getting into things that a lay jury wouldn't have an idea as to
16 what it meant. It's not clear.

17 The other one that we wanted to flag for the Court
18 was -- we're not against the general concept, but question
19 number 58. But this, I think, is more of an instruction for the
20 Court to give. And once we get into this case the plaintiff
21 will be required to prove its case by a preponderance of the
22 evidence, meaning the greater weight of the evidence, once we
23 get into this next line, "Does anyone feel uncomfortable making
24 a decision where there's as much as 49 percent doubt in their
25 mind?" I think that gets confusing for the jury, and I think

1 there's a way to kind of -- to streamline that in a way that
2 isn't pushing the jury to 49 percent means something.

3 THE COURT: Okay. Thank you.

4 Mr. Haraldson, response?

5 MR. HARALDSON: As for 36, I agree that probably could
6 be written better. I think that maybe the proper tone of the
7 question would be, "Do any of you think that a police officer
8 has to allow disobedience to a lawful order?"

9 THE COURT: Okay. You said "has to allow" --

10 MR. HARALDSON: Or must allow, something along those
11 lines. You know, actually I think maybe a better word than
12 "must" because that's compulsory, maybe "should," "should
13 allow." "Do any of you think that a police officer should allow
14 disobedience to lawful orders?"

15 THE COURT: My suggestion would be, "Do any of you
16 think that a police officer must permit noncompliance with a
17 lawful police order," singular, "or should permit?" And I think
18 noncompliance as opposed to disobedience is better.

19 MR. HARALDSON: Okay.

20 THE COURT: Plaintiff?

21 MR. KHAZAEI: We agree with that change. The other
22 issue I think still is the question of the word "lawful."

23 THE COURT: And that is going to be discussed
24 throughout the course of trial, and I don't think that there's
25 anything in terms of asking that question that informs them what

1 a lawful order is, so I don't think that that's objectionable.

2 MR. KHAZAELI: Thank you.

3 THE COURT: "Do any of you think that a police officer
4 should permit noncompliance with a lawful police order?"

5 Mr. Haraldson?

6 MR. HARALDSON: That would be acceptable.

7 THE COURT: Okay. And then the other one, any
8 response in regards to the 49 percent?

9 MR. HARALDSON: Well, I do assume the Court will talk
10 about the preponderance of the evidence standard; but with that
11 in mind, I don't have a problem with striking that.

12 THE COURT: Okay. And I do talk about the
13 preponderance of the evidence, although I talk about the greater
14 weight of the evidence because that's the language that we use.
15 And to the extent that you have follow-up, you can talk about
16 what that means. But, again, I interview jurors after every
17 trial, and no juror has ever said, "I wish we spent more time on
18 voir dire." Every juror always says, "Why did they keep harping
19 on this topic?" So to the extent that you care about how the
20 jury thinks of you, I would ask you to be streamlined and
21 thoughtful in how you approach voir dire.

22 Any other issues from the plaintiff?

23 MR. WYRSCH: No, Your Honor.

24 THE COURT: So one thing, I've noticed that you all
25 are tag-teaming is the best I can say. I'm going to speak to

08:56:04 1 Mr. Khazaeli just for efficiency sake, and it's not out of
08:56:12 2 disrespect for the other two members of the trial team. It is
08:56:15 3 easier for the Court to have one point person that is speaking
08:56:18 4 on behalf. Similarly, I assume that you'll engage in different
08:56:23 5 examinations and arguments throughout the course of trial.
08:56:26 6 Whoever is doing the examination needs to be the person who is
08:56:29 7 making the objections, needs to be the person who is responding
08:56:33 8 to objections and needs to be the person who is addressing the
08:56:36 9 Court. You can consult with each other all you need, but I
08:56:40 10 can't have multiple people jumping up during the course of
08:56:44 11 trial.

08:56:47 12 Do you understand that?

08:56:47 13 MR. KHAZAEI: That's actually how we were planning on
08:56:52 14 doing it, Your Honor.

08:56:53 15 THE COURT: Thank you.

08:56:53 16 On behalf of the defense, anything you need to bring
08:56:55 17 to the Court's attention?

08:56:56 18 MR. HARALDSON: I think there's one issue that the
08:56:58 19 parties are close to resolving between each other. Thursday,
08:57:02 20 Thursday night, or was it -- no; Sunday night, the plaintiff
08:57:07 21 sent me some proposed changes to what's been marked and
08:57:10 22 introduced as Exhibit Q. We're pretty close together. Those
08:57:14 23 changes are actually pretty close to the current exhibit, but --
08:57:20 24 so I assume we'll be able to hash that out today before Exhibit
08:57:23 25 Q is used. I think that the first time that would come up is

1 when the plaintiff testifies, which I assume is probably going
2 to be this afternoon at the earliest, so we should be able to
3 address those issues before then and make the changes.

4 THE COURT: Okay. Thank you, Mr. Haraldson.

5 We did make the room behind here available to the
6 plaintiff for purposes of being out of town and being
7 comfortable.

8 I assume that you all have resolved whatever issues
9 were in terms of the expert's videography that was brought to
10 the Court's attention. I heard nothing in response to my order,
11 so I assume that's been resolved.

12 MR. KHAZAEI: We have, Your Honor. I think
13 Mr. Haraldson has obtained somebody to come and record, and now
14 that we've got the Court's order as to how we're going to deal
15 with punitives, we'll decide how we want to break that up.
16 We'll just do the sections that pertain to phase one in front of
17 the jury. Then we'll record.

18 To that same line, for one of our witnesses,
19 Dr. Shelton -- his testimony was fairly short; he's the
20 dentist -- we were able do testimony with him over the phone and
21 by video. We have a copy of that video testimony and the
22 transcripts. I've shared that with Mr. Haraldson. It's about
23 45 minutes total. The only issue that I see with that -- and we
24 would defer to the Court on this -- is when you listen to the
25 video, sometimes, because I'm on the side of the video, my voice

1 gets a little bit low. And we would suggest that while the
2 people are watching the video that they have a copy of the
3 transcript so that they can follow along. Luckily, for the
4 Court and for us, there were no objections at all during that
5 testimony, so I think we could just play it straight through.
6 That's one issue there.

7 One other issue is that due to some scheduling
8 reasoning -- and actually I meant to tell you, Mr. Haraldson,
9 we're going to flip flop, if the Court is amenable to it, our
10 first two witnesses. We expect them both to get on and off
11 today, but we would like to start with Breanna Hunemiller and
12 then have Darrick Burnikel afterwards. And that was my fault,
13 Your Honor, because I was the only one that didn't realize that
14 we were going to 4:30 as opposed to 6:00 every day.

15 THE COURT: Did you say instead of 6:00?

16 MR. KHAZAELI: Instead of 6:00. I don't know --
17 everybody thought I was crazy when I mentioned it. No,
18 everybody has been very clear.

19 THE COURT: So you're saying that you're going to
20 switch the plaintiff and Ms. Hunemiller?

21 MR. KHAZAELI: No. The plaintiff is our third.

22 THE COURT: Oh, I'm sorry.

23 MR. KHAZAELI: It gets confusing with the Justins and
24 the Dustins. Darrick Burnikel is plaintiff's cousin, and we're
25 going to switch one and two if the Court is amenable to that.

1 THE COURT: Okay. And they're here and available?

2 MR. KHAZAELI: They are.

3 THE COURT: So the first question is, Mr. Haraldson,
4 any objection to the jurors being able to read along with the
5 transcript while the video is playing?

6 MR. HARALDSON: Not having heard it, I would trust
7 that Mr. Khazaeli is probably right, so I don't have a problem
8 with them reading along as long as they don't keep it.

9 THE COURT: And that's what the Court would say. I
10 have no problem handing out -- if you make 12 copies of the
11 transcript -- and that's your responsibility to do -- we can
12 hand it out while the video is playing, and then we'll take it
13 back during the course of the -- as soon as the testimony is
14 over.

15 MR. KHAZAELI: I think that that plan works, and I
16 think we would probably want to add just a short direction from
17 the Court to tell them not to read ahead as it's going on.

18 THE COURT: Happy to do that.

19 MR. KHAZAELI: The only other thing that we want to
20 bring up to the Court, and I think both Mr. Haraldson and I
21 thought about this yesterday, is we've made a small
22 demonstrative that we can put up, not to give to the jury, that
23 is just a to-scale map of the intersection showing where the two
24 most important landmarks are, the vestibule at Jokers and the
25 cab stand. And I don't know how the Court wants us to deal with

1 that. I don't think we ever talked about dealing with
2 demonstratives that aren't going into evidence; but I think what
3 we would do is just put it on the screen, let them see it, let
4 either party, if they want to, talk about directions and stuff.
5 That's the only other thing that I don't think we've raised.

6 THE COURT: Mr. Haraldson?

7 MR. HARALDSON: In general -- and I told
8 Mr. Khazaeli -- I don't have a problem with that. I haven't
9 seen it. I assume he's going to let me see it, but in general I
10 don't have a problem with the demonstrative.

11 THE COURT: So why don't you all have the opportunity
12 to talk about that. If it is an issue, let me know. The only
13 issue that I have with demonstratives is that you don't leave it
14 up when you're not talking about it. So as soon as you're done,
15 take it down. And I need to make sure we have our second screen
16 from the IT people, but I'll do that from my end.

17 Anything further on behalf of the plaintiff?

18 MR. KHAZAEI: One just quick question. With the
19 assumption that we would do it in a way that wouldn't disrupt
20 the Court, at times would it be okay with the Court if Ms. Drake
21 would be allowed to go into the room if we need to have her pull
22 something for us while the case is going on, or do you want us
23 to limit that to during breaks?

24 THE COURT: A couple of things. You may be seated.
25 I'm going to ask for her to sit in the front row on this side so

1 that it's clear that -- and I don't know, you could be in the
2 row behind, but she needs to be on this side so she's in your
3 line of sight. I would like you also to provide me with her
4 name so I can include her in your team so that the jurors know
5 who this person is who's interacting with you. Generally
6 speaking, it would be my preference that you not have someone
7 scurrying back and forth and opening -- going back into the jury
8 room that we've allowed you to use and you use the times and
9 breaks. To the extent that there's something that you need
10 immediately, you can ask the Court's permission and we can go
11 from there. I think it would be distracting to the jury to do
12 that on a regular basis.

13 MR. KHAZAEI: Thank you, Your Honor.

14 THE COURT: Mr. Haraldson?

15 MR. HARALDSON: I think -- I believe Mr. Khazaeli
16 covered most of the issues, and we're ready to go.

17 THE COURT: Okay. So I haven't talked to my jury
18 coordinator. I don't know what the status is on the jurors
19 being here.

20 Do you know?

21 THE LAW CLERK: Yes. They're here. There's 21 here.

22 THE COURT: We have 21 of the 22 jurors we expected
23 are here. There's another trial going on in the court --
24 there's another jury here, and they are separate, in a different
25 courtroom. So we'll make sure that our jurors stay away. Just

1 so you know, we are using for them the jury room across the hall
2 that's associated with my colleague, Judge Rose's courtroom
3 because my jury room, as you've seen, only has one door in and
4 out, and it makes it difficult for bench conferences, which is
5 why we're using that one.

6 All right. So we'll be in recess. They're going
7 to -- we'll line up the jurors, and then I'll come out when
8 everybody is ready.

9 Thank you. We're in recess.

10 (Recess at 9:05 a.m., until 9:24 a.m.)

11 (A jury was impaneled and sworn.)

12 (Preliminary instructions were read and reported but
13 not transcribed.)

14 (Recess at 12:03 p.m. until 1:00 p.m.)
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1 AFTERNOON SESSION 1:05 p.m.

2 (In open court, out of the presence of the jury.)

3 THE COURT: Thank you. Please be seated.

4 We're on the record, outside the presence of the jury.

5 Counsel, is there anything you need to bring to my
6 attention before we bring in the jury?

7 MR. WYRSCH: A couple of things, Your Honor. One,
8 just in the interim, we were working on the -- trying to -- I
9 was asking the clerk how to publish to just the witness and the
10 judge for an exhibit, when an exhibit is presented to the
11 witness but not to the entire court and jury. My understanding
12 is there's some technical glitch right now, so I believe we're
13 going to be using paper exhibits to the witness unless we can
14 get that resolved.

15 THE COURT: Okay. One moment.

16 (Law clerk conferring with the Court.)

17 THE COURT: Okay. We'll get that addressed.

18 MR. WYRSCH: And, two, I guess, we were wondering, in
19 our exhibit list we had the As, Bs, and Cs. We've never really
20 resolved any objections in the Bs and Cs. Are we just planning
21 on, by exhibit, the Court ruling?

22 THE COURT: Yes.

23 MR. WYRSCH: All right.

24 THE COURT: If there's -- I mean, all of the Bs
25 certainly. The question is if there's a foundation, if there's

1 some specific objection that you have, I will rule on the
2 objection as it is presented to the Court.

3 MR. WYRSCH: Okay.

4 THE COURT: Is there something more specific? I mean,
5 we ruled on the motions in limine.

6 MR. WYRSCH: No. This is a different practice issue.
7 Where we generally practice, they take care of all of that
8 during pretrial. So I just wanted to make sure I knew how the
9 Court wanted to proceed when we start presenting exhibits that
10 are not on the agreed list.

11 THE COURT: Okay. Anything else?

12 MR. WYRSCH: I believe that is it for us.

13 THE COURT: Mr. Haraldson?

14 MR. HARALDSON: Just so I understand, you just want us
15 to do the old traditional offer exhibit, objection, admitted?

16 THE COURT: For anything other than an A. I mean,
17 everyone is maintaining their objections to B and C exhibits?

18 You're nodding.

19 You're nodding.

20 If you have a specific objection, make it, and I'll
21 rule on it, and that's how the record will be made. If you
22 don't make an objection, if during the course of the foundation
23 laid or whatever it is, it becomes clear that your objection is
24 unfounded, then certainly don't make the objection. But if you
25 don't make the objection, the record is not preserved.

1 MR. HARALDSON: Very good. That's all I have.

2 THE COURT: Thank you.

3 Is there any issue with the presentation to -- during
4 your opening statement, you're simply going to use the picture
5 that's an A exhibit anyway?

6 MR. KHAZAEI: Yes, Your Honor. The only exhibit that
7 I'm planning to use during the opening is Exhibit 1, page 1,
8 which is an A exhibit.

9 THE COURT: All right. Thank you.

10 (Pause.)

11 THE COURT: Counsel, looking at the exhibits that
12 we -- the B exhibits, most of those seem to be exhibits that
13 were covered by the Court's order in terms of the -- for
14 example, the reprimand of Wessels or any of the prior bad acts
15 would not be admissible in phase one, but phase two. Most of
16 those appear to be those types of exhibits.

17 Am I incorrect in that?

18 MR. WYRSCH: You are correct.

19 I was just going through that list. I think the only
20 one that I would anticipate we might get to today is 60 and 61,
21 the photograph of the trucks. If we end up getting to
22 plaintiff's testimony, we intend to introduce that in evidence.

23 THE COURT: Mr. Haraldson?

24 MR. HARALDSON: The only B exhibit that we may get to
25 are K, which is the booking information for Ms. Hunemiller, and

1 L, which also is reference to Ms. Hunemiller, although I have to
2 say I probably am not going to introduce L. It's the warrant,
3 arrest information. I don't know that that may be particularly
4 relevant unless she brings it up in a particular way.

5 And only if the plaintiff testifies today would M and
6 P come up for the B exhibits and then Q for the C exhibits.

7 THE COURT: Did you all reach an agreement about Q?

8 MR. KHAZAEI: We did, Your Honor. It's just once we
9 get a break, I'm going to do the final redactions so that we can
10 check, but we've come to an agreement.

11 THE COURT: Okay. So that would not be an issue
12 assuming that those things are worked out?

13 MR. HARALDSON: From the defendant's perspective, yes.

14 THE COURT: Okay. And from the plaintiff's
15 perspective as well is what it sounds like?

16 MR. WYRSCH: Yeah, I guess subject to our initial
17 objection to the evidence coming in at all.

18 THE COURT: Which I overruled in my motions in limine.

19 MR. WYRSCH: Right, right.

20 THE COURT: Okay. So 60 and 61 explain to me, before
21 the jury comes in, why those are not relevant and what I should
22 be concerned about.

23 MR. WYRSCH: Why they're not relevant?

24 THE COURT: Right.

25 MR. WYRSCH: We think they are relevant.

1 THE COURT: I mean -- yeah, okay. Mr. Haraldson.

2 MR. WYRSCH: I'll be glad to argue for Mr. Haraldson.

3 THE COURT: No. Thank you.

4 MR. HARALDSON: Well, they are two photographs of
5 trucks. I believe they're trucks that Mr. Burnikel uses in his
6 business. I don't have -- we haven't had -- those are new
7 documents prior to -- we received them just about the time of
8 the pretrial, so I just think there has to be some testimony as
9 to what the hell they mean. Sorry; heck.

10 THE COURT: Thank you for refraining from profanity in
11 the courtroom; but yes.

12 MR. HARALDSON: So, I mean, it's subject to what he
13 testifies to them about. The relevance objection was mainly
14 because I hadn't seen them before and hadn't seen them at the
15 time. They sound innocuous enough, but I think foundation needs
16 to be laid.

17 THE COURT: Okay. And you said K -- you don't intend
18 to offer L. You said K, and what else were the ones that you
19 said before?

20 MR. HARALDSON: Under B, if Ms. Hunemiller is going to
21 testify, I think that may be one that would come in, although it
22 probably would be something that would be introduced by one of
23 the officers, although that sounds unlikely; but it's something
24 that refers to her. And under C, only if the plaintiff
25 testified today would Q be an issue as we already addressed.

1 THE COURT: Okay. Thank you.

2 Again, the reason -- I mean, most of these things, in
3 my view, they all were dealt with by the bifurcation, which is
4 why we haven't spent any time on them; but to the extent they
5 weren't, make your objection, and the Court will rule on them as
6 it arises.

7 I've been informed that the jury is ready, and we will
8 have them come in at this time.

9 (In open court, in the presence of the jury.)

10 THE COURT: Thank you. You may be seated.

11 We're back on the record, in the presence of the jury,
12 in the matter of Dustin Burnikel versus Michael Fong, Gregg
13 Wessels, and the City of Des Moines, Case No. 4:15-cv-50.

14 This is now the time for opening statements. Evidence
15 in a trial often comes into the record piecemeal and out of
16 chronological or logical sequence. During opening statements
17 you are provided with thumbnail sketches of the case. Each
18 attorney will explain to you what he believes the issues in the
19 case are and what the attorney expects the evidence will be.
20 These statements, as I said previously, are not evidence and
21 should not be considered by you as evidence. Please give the
22 attorneys your undivided attention.

23 (Opening statements of counsel were reported but not
24 transcribed.)

25 THE COURT: At this time I'm going to have my law

1 clerk pass out the binders to you. As I told you before and as
2 you saw, they will have your oath in them. They will also have
3 the preliminary instructions, and then they'll have some paper.

4 A couple things to note. First, where you are seated
5 now will be the seats that you will be in through the remainder
6 of the trial. Each one of the jury notebooks has an identifying
7 number on the front of it. That is your juror number, and that
8 is your jury notebook. I will ask before you come in to court
9 each day, you'll line up and you'll enter, and you'll seat
10 yourself in the order in which you're seated now.

11 Jurors are permitted in this courtroom to take notes
12 during the trial and then to have the notes with you during
13 deliberations. No one is required to take notes. In fact, you
14 should not take notes if you feel like note-taking might
15 distract you from the evidence or the testimony of the
16 witnesses. On the other hand, if you believe that note-taking
17 might better focus your attention on the witnesses and the
18 evidence or might better help you to recall what went on during
19 the trial, you may feel free to take notes. The notes are
20 intended only to be a help to your memory. They should not take
21 precedence over your own independent recollection of the
22 testimony and the evidence. Those jurors who do not take notes
23 should rely on their own memory of the evidence and should not
24 be influenced by the fact that another juror has taken notes. A
25 juror's notes are only for the note-taker's personal use in

1 refreshing his or her own recollection.

2 I want to mention two concerns about note-taking
3 before we proceed further with the trial.

4 First, you must consider all of the evidence presented
5 in trial during your deliberations. One concern is that a juror
6 might take conscientious notes at the beginning of the trial and
7 then, as the trial continues, fail to take as many notes and
8 take fewer and fewer notes. If that happens the juror can be
9 left with an impression which is not a complete view of all of
10 the evidence. It's something to be careful about.

11 Secondly, some jurors focus so much on taking notes
12 that they miss what's happening in the court. Do not become so
13 involved in note-taking that you miss part of the testimony.

14 As I said before, the notes will be taken with you to
15 the jury room for your use in deliberations. However, again, I
16 caution you that your notes are just that, notes, and they are
17 not evidence.

18 There's loose-leaf paper in the back of your binders.
19 There's also a pen. If you find yourself needing more paper or
20 more pens, you can let Ms. Berg know, and we'll make sure we get
21 that to you as soon as possible. If you do not intend to take
22 notes, you can leave your binder on the floor next to your
23 chair.

24 During recesses outside of the courtroom, you can
25 leave your binders on your chairs. They will not be disturbed.

1 At the end of each day, we will collect those binders, and we'll
2 keep them and secure them for court for the next day. At no
3 time during or after the trial will anyone look at your notes,
4 including me. Your notes will be destroyed at the conclusion of
5 the trial.

6 With that, I'm going to read into the record some
7 stipulated facts and then allow the plaintiff to begin
8 presenting their case.

9 The plaintiff and the defendants have stipulated, that
10 is they have agreed, that the following facts are true:

11 One, in the early morning of February 16, 2013,
12 defendants Gregg Wessels and Michael Fong arrested plaintiff
13 Dustin Burnikel.

14 Two, at all times during the February 16, 2013,
15 interactions with plaintiff, defendants Wessels and Fong were
16 acting within the scope of their employment or duties as law
17 enforcement officers for the City of Des Moines Police
18 Department.

19 Three, the City of Des Moines is responsible for
20 maintaining and operating the Des Moines Police Department.

21 Four, during plaintiff's arrest, defendants Wessels
22 and Fong used physical force against plaintiff.

23 Five, defendants Wessels and Fong arrested plaintiff.

24 Six, defendants Wessels and Fong charged plaintiff
25 with public intoxication, interfering with official acts in

1 violation of Iowa law, and resisting arrest in violation of a
2 Des Moines City ordinance.

3 Seven, the City of Des Moines prosecuted plaintiff in
4 a criminal proceeding in Polk County, Iowa.

5 Eight, a jury acquitted plaintiff of all charges.

6 You must, therefore, treat these facts as having been
7 proved.

8 Thank you.

9 Is the plaintiff prepared to proceed?

10 MR. KHAZAELI: Yes, Your Honor.

11 THE COURT: Would you call your first witness.

12 MR. KHAZAELI: Yes, Your Honor. We would call Breanna
13 Hunemiller.

14 THE COURT: Thank you.

15 (Counsel conferring.)

16 THE COURT: My understanding is that the technical
17 difficulties have been resolved.

18 MR. KHAZAELI: Great. I just like to have a backup
19 plan, Your Honor.

20 THE COURT: I appreciate that.

21 MR. KHAZAELI: And, Your Honor, you said you're okay
22 with me sitting?

23 THE COURT: Yes.

24 MR. KHAZAELI: Thank you.

25 THE COURT: Please come forward, ma'am, on this side.

1 If you'll come forward this way.

2 If you'll please pause and raise your right hand and
3 prepare to be sworn.

4 BREANNA HUNEMILLER, PLAINTIFF'S WITNESS, SWORN

5 THE COURT: Thank you, ma'am. You may sit down.

6 Ma'am, would you please state and spell your full name
7 for the record.

8 THE WITNESS: Breanna Hunemiller, B-R-E-A-N-N-A
9 H-U-N-E-M-I-L-L-E-R.

10 THE COURT: Thank you.

11 And, ma'am, make yourself comfortable in your seat and
12 try to speak into the microphone so everybody can hear you
13 clearly.

14 THE WITNESS: All right.

15 THE COURT: Your witness, Counsel.

16 MR. KHAZAELI: Thank you, Your Honor.

17 DIRECT EXAMINATION

18 BY MR. KHAZAELI:

19 Q. Ms. Hunemiller, just to be clear, at any point I ask you a
20 question that you don't understand or don't hear, feel free to
21 ask me to rephrase that.

22 A. Yes, sir.

23 Q. As the Court asked you, could you please state your name?

24 A. Breanna Hunemiller.

25 Q. And, Ms. Hunemiller, where do you currently live?

1 A. New Smyrna Beach, Florida.

2 Q. Where is New Smyrna Beach, Florida, relative to other
3 cities?

4 A. It's about 30 miles south of Daytona Beach.

5 Q. What do you do in New Smyrna Beach?

6 A. I'm a freight broker.

7 Q. What's a freight broker? Can you explain that?

8 A. Basically I find companies, I quote them prices to move
9 their product, and then I contact carriers, negotiate pricing to
10 move that product.

11 Q. And that's your current job?

12 A. Yes, sir.

13 Q. And you're missing work today?

14 A. Yes.

15 Q. Where did you live in 2013?

16 A. Waverly, Iowa.

17 Q. And can you tell me where Waverly, Iowa, is?

18 A. It's about two-and-a-half, three hours northeast of here.

19 Q. And describe Waverly to me.

20 A. Small town, 10,000 people, farming community.

21 Q. And is your family at all involved in farming?

22 A. Yeah. My stepdad is a farmer. His entire family is.

23 Q. And you were living in Waverly at the time; correct?

24 A. Yes, sir.

25 Q. Where were you working?

14:11:09 1 A. At a bar about seven miles by Waverly. It's Shellrock,
14:11:18 2 Waverly Shellrock.

14:11:19 3 Q. Can you describe, how big is Shellrock?

14:11:22 4 A. Like 800 people.

14:11:25 5 Q. In February of 2013, you were in Des Moines; correct?

14:11:28 6 A. Yes, sir.

14:11:29 7 Q. What were you doing in Des Moines, Iowa?

14:11:31 8 A. We were here for state wrestling to watch the high school
14:11:36 9 boys, Waverly and Denver, wrestle.

14:11:40 10 Q. Why were you here for a wrestling tournament? Do you have
14:11:44 11 any relationship with wrestling?

14:11:46 12 A. I've followed wrestling since I was about 12 years old, been
14:11:50 13 to dozens of AAU and high school tournaments.

14:11:55 14 Q. Was it a big deal for you to come down to Des Moines for the
14:11:59 15 wrestling tournament?

14:12:00 16 A. Absolutely.

14:12:00 17 Q. Who did you come down to Des Moines with?

14:12:02 18 A. I came with Kyle and Michael, high school friends of mine.

14:12:05 19 Q. Who are Kyle and Michael?

14:12:07 20 A. They're friends of mine from high school.

14:12:09 21 Q. And are Kyle and Michael involved in wrestling at all?

14:12:12 22 A. They were wrestlers in high school, and then Kyle had family
14:12:16 23 members that were participating. They were all on the Denver
14:12:21 24 High School wrestling team that went to state.

14:12:22 25 Q. So Kyle had family members, younger kids who were wrestling?

14:12:27 1 A. Yes.

14:12:27 2 Q. Where did you stay when you were in Des Moines for the
14:12:31 3 tournament?

14:12:31 4 A. The Bavarian Inn.

14:12:35 5 Q. And do you know roughly where the Bavarian Inn is in
14:12:38 6 comparison to downtown Des Moines?

14:12:41 7 A. It was about 15 miles from here.

14:12:43 8 Q. And how did you get from the Bavarian Inn to Des Moines for
14:12:46 9 the wrestling tournament?

14:12:48 10 A. We had contacted a cab driver, and he said as long as we --
14:12:51 11 he would give us a discount if we used him throughout the entire
14:12:55 12 period of time. So if we went out to eat or went to any of the
14:12:58 13 tournaments or anything, we would call him directly on his cell
14:13:01 14 phone.

14:13:01 15 Q. And did you ever use him throughout the weekend?

14:13:04 16 A. A lot, yes.

14:13:05 17 Q. And he gave you a discount?

14:13:07 18 A. Yes.

14:13:09 19 Q. So you came down on Thursday; correct?

14:13:11 20 A. Yes.

14:13:13 21 Q. Let's move to Friday. Did you go to the wrestling
14:13:17 22 tournament --

14:13:17 23 A. Yes.

14:13:18 24 Q. -- on Friday?

14:13:19 25 A. Yes, we did.

1 Q. And just because we're having somebody type this, if you
2 would just make sure that you wait until I'm done because it's
3 really difficult for them to type --

4 A. I'm sorry.

5 Q. That's okay. I do it all the time. It's difficult for her
6 to type when we're both speaking.

7 So did you go to the tournament that Friday night?

8 A. Yes.

9 Q. And what time did you stay at the tournament until?

10 A. I want to say around 9:00, 9:30.

11 Q. So approximately 9:00 or 9:30 you left the tournament?

12 A. Yes.

13 Q. Do you remember where you went next?

14 A. We went to where Kyle's family was staying. They had a
15 banquet room where they had brought a bunch of food. There were
16 about 20 of his family members, and we ate with them.

17 Q. Was the banquet room in a restaurant? Where was it located?

18 A. In a hotel.

19 Q. So you went and met Kyle's family. Were there any little
20 kids there?

21 A. Yeah.

22 Q. What was the mood in that room when you were having dinner
23 there with Kyle's family?

24 A. Good. It was excited. Everybody was happy to be there.

25 It's a big deal to go to state wrestling, especially for Denver.

1 They're a smaller school.

2 Q. What was your mood at that point?

3 A. Excited.

4 Q. Was it meant to be a fun week for you?

5 A. It -- state wrestling is meant to be a fun week every year.

6 It's huge. I mean, Waverly, Denver, it's just -- that's what we
7 do in Iowa.

8 Q. I've heard.

9 After dinner is done, what do you do?

10 A. At that point we had went to a bar that was close to that
11 hotel. We had a drink there. It wasn't really our atmosphere,
12 so we went to a different bar. We played darts, and then we
13 left there and went to Jokers.

14 Q. All right. So you were at two bars first, and then you left
15 and then you ended up at Jokers; correct?

16 A. Yes.

17 Q. Just a little hint, if you're going to pour yourself water,
18 you need to twist the top. We've had a lot of people have
19 issues.

20 A. Okay.

21 Q. So you leave and you go to Jokers; correct?

22 A. Yes, sir.

23 Q. Could you describe approximately what time you arrived at
24 Jokers?

25 A. Midnight; I would say midnight.

1 Q. And what type of place is Jokers?

2 A. It's a club. It's a dance club, music, lasers.

3 Q. Strobe lights?

4 A. Strobe lights.

5 Q. Were you dancing that night?

6 A. Yes.

7 Q. What kind of mood were you in?

8 A. I was excited. I was happy. Again, it's Des Moines, it's
9 state wrestling.

10 Q. You had some drinks that night; correct?

11 A. Yes.

12 Q. About how many?

13 A. Five; I would say five.

14 Q. And those drinks made you feel pretty happy?

15 A. Yeah.

16 Q. How long did you stay at Jokers?

17 A. We stayed until last call.

18 Q. And at last call what did you do?

19 A. We went down into -- there's like a -- Jokers, there's an
20 entryway on the bottom floor, and then the top floor is the
21 club. So we down to the entryway, and I called our cab driver
22 we had been using.

23 Q. How many people were in the entryway?

24 A. Twenty, thirty.

25 Q. And is it enclosed with brick? How is it enclosed?

1 A. Glass, windows.

2 Q. Was it heated?

3 A. Yes.

4 Q. So you said that you called your cab driver. Is that the
5 same cab driver that you told us about earlier?

6 A. Yes.

7 Q. And when you got ahold of the cab driver, what was that
8 conversation about?

9 A. I was telling him where to pick us up obviously. I told him
10 we were at Jokers, and he said that Jokers must be new because
11 he wasn't aware of where that location was, so he asked me for a
12 cross street. So I went outside and I looked, and I saw the
13 cross street, and I told him there was actually a cab stand
14 across the street, and he said, "Go there, wait for me there."

15 At that point I was going to go back into the entryway
16 because it was warm, but they were kicking everybody out at that
17 point, so Michael and I headed towards the cab stand.

18 MR. KHAZAELI: Can we publish the map?

19 Do you want me to use the Elmo?

20 THE COURT: Is the connection to your computer -- is
21 your computer alive?

22 MR. KHAZAELI: Let's try again.

23 There we go.

24 BY MR. KHAZAELI:

25 Q. Do you see -- and then we lost it.

14:18:31 1 THE CLERK: It's pushed in all the way?

14:18:34 2 MR. KHAZAELI: It is. If not, we can go to the Elmo,
14:18:37 3 I've got it on Elmo.

14:18:41 4 THE CLERK: Okay.

14:18:49 5 Okay.

14:18:55 6 MR. KHAZAELI: Can you zoom out a little bit?

14:18:57 7 THE CLERK: Yes.

14:18:58 8 BY MR. KHAZAELI:

14:18:58 9 Q. If you can look behind you --

14:19:00 10 THE COURT: You actually have a screen right in front
14:19:03 11 of you.

14:19:03 12 BY MR. KHAZAELI:

14:19:03 13 Q. Oh, can you see it on the screen in front of you?

14:19:06 14 A. Yes.

14:19:06 15 Q. When you say you were in Jokers, is that the direction the
14:19:11 16 cab stand was?

14:19:11 17 A. Yes, directly across.

14:19:12 18 Q. Directly north of you?

14:19:14 19 A. Yes.

14:19:15 20 Q. Good. We can unpublish. Thank you.

14:19:17 21 And you were with Michael at this point; correct?

14:19:21 22 A. Yes, sir.

14:19:22 23 Q. What happened to Kyle?

14:19:23 24 A. He had went back to the hotel to hang out with his family.

14:19:28 25 Q. And when you leave the glass, warm area at Jokers, describe

14:19:35 1 what you do.

14:19:36 2 A. We went to the corner and went straight across the street to
14:19:40 3 the cab stand.

14:19:41 4 Q. Now, when you were in the glass area, had you ever met my
14:19:48 5 client, Mr. Burnikel, before?

14:19:49 6 A. No. I didn't see him in there.

14:19:51 7 Q. Had you ever talked to him before?

14:19:53 8 A. No.

14:19:55 9 Q. Did you have any relationship with him at all?

14:19:57 10 A. No, sir.

14:19:57 11 Q. So you're crossing the street, okay. When you crossed the
14:20:03 12 street, what do you see?

14:20:07 13 A. People at the cab stand.

14:20:10 14 Q. Do you see anybody being arrested?

14:20:13 15 A. No.

14:20:14 16 Q. Do you see anybody, any chaos?

14:20:17 17 A. No.

14:20:18 18 Q. You kind of laughed there. Why did you laugh?

14:20:20 19 A. Because everybody -- I mean, everybody at the cab stand, we
14:20:24 20 were all excited. Everybody was happy to be there. There was
14:20:28 21 no commotion of any kind.

14:20:33 22 Q. Now, eventually you saw the defendants; correct?

14:20:36 23 A. Yes, sir.

14:20:37 24 Q. What did you do when you saw the defendants?

14:20:39 25 A. I had approached Officer Wessels, and I put my hand on his

14:20:45 1 shoulder.

14:20:45 2 Q. How did you put your hand on his shoulder? Roughly? Could
14:20:49 3 you describe that?

14:20:50 4 A. Gingerly, I guess I would say.

14:20:52 5 Q. That seems strange to me. Why would you put your hand on
14:20:56 6 Mr. Wessels' shoulder?

14:20:59 7 A. I tend to have an attraction towards men in uniform.

14:21:05 8 Q. And this has been an attraction for a while?

14:21:07 9 A. Yes.

14:21:08 10 Q. So when you were putting your hand on his shoulder, was it
14:21:11 11 because you found him attractive?

14:21:12 12 A. Yes.

14:21:13 13 Q. This is one of the first cases that I've had something like
14:21:17 14 this occur with the defendants.

14:21:19 15 When you put your hand on his shoulder -- well, jump
14:21:25 16 back for a second. You said that you had worked as a bartender
14:21:29 17 in Shellrock; correct?

14:21:30 18 A. Yes, sir.

14:21:31 19 Q. How many nights a week did you bartend?

14:21:33 20 A. Pretty much every night.

14:21:35 21 Q. And in your position as a bartender in Shellrock, did you
14:21:40 22 have occasion to interact with police officers?

14:21:42 23 A. Every night.

14:21:43 24 Q. How was your relationship with those officers?

14:21:48 25 A. Excellent. We worked with each other. Obviously, if I had

1 any rowdy patrons, they would assist me. They came in to check
2 every night. I was just friendly with all of them.

3 Q. Did you know them by a first name basis?

4 A. Yes, sir.

5 Q. Did they know you? Did they recognize you?

6 A. Yes.

7 Q. Do you believe if I were to ask them, would they say they
8 had a friendly relationship with you?

9 A. Absolutely.

10 Q. Generally, in your life, how has your relationship been with
11 law enforcement officers?

12 A. Good, excellent. I have the utmost respect. That's just
13 how I was raised.

14 Q. When you say how you were raised, can you elaborate on that
15 a little bit?

16 A. I mean, police officers, they have a hard job. They're
17 brave. I was just raised that they're there to protect and
18 serve and to have respect.

19 Q. And an extra bonus is sometimes they're cute?

20 A. Sometimes. A lot of times they're cute.

21 Q. So when you put your hand on Officer Wessels' shoulder, can
22 you tell me what happened next?

23 A. At that point I remember just feeling a yank, and then I was
24 whipped around, and then I hit face first on the ground.

25 Q. We'll take this one step at a time.

1 What were you wearing?

2 A. I was wearing a bomber jacket that has a big hood on the
3 back of it.

4 Q. And before you put your hand on the shoulder of Officer
5 Wessels, did you observe what the officers were doing?

6 A. They were talking to each other in the street, just by the
7 curb.

8 Q. Were they talking loudly like they were planning to do
9 something?

10 A. No.

11 Q. So you didn't think -- did you think there was any problem
12 with you putting your hand on the officer's shoulder?

13 A. No, I did not.

14 Q. So let's go back. You said you were wearing a large bomber
15 jacket. After you put your hand on the officer's shoulder, can
16 you tell me what happened?

17 A. I had gotten ripped backwards, what I assume was by the hood
18 of my coat, and then yanked this way (indicating) and slammed on
19 the ground.

20 Q. Would you mind standing for the jury, taking a step off?

21 And can you show me how your body reacted? You said
22 you were ripped. Can you just demonstrate to the jury what
23 happened to your body?

24 A. It would have been I was yanked back this way (indicating)
25 and then swung and then slammed on my face.

1 Q. You can have a seat. Thank you.

2 You said you were slammed on your face?

3 A. Yes.

4 Q. Is there any chance that you might have just accidentally
5 tripped on your own and fallen down?

6 A. No.

7 Q. Is there any chance that you were just being clumsy?

8 A. No.

9 Q. When you say you were slammed, describe that to me.

10 A. Like I was swung around and I was slammed on my face.

11 Q. What part of your body hit the ground?

12 A. I believe I landed on my knees and my shins because the next
13 day they were bruised really bad, and then I went down on my
14 face, face down pretty quickly.

15 Q. How quickly after you put your hand on Officer Wessels'
16 shoulder was it before you were face down on the ground?

17 A. It was instant, just like that (indicating).

18 Q. And you didn't see them engaging or arresting anybody at
19 that time?

20 A. No.

21 Q. Now, you're face down on the ground. What do you do?

22 A. I immediately start bawling, scared, confused.

23 Q. And how much time, after you got to the cab stand, did this
24 whole thing happen? Were you there for two, three, four
25 minutes? How much time was there after you got to the cab stand

14:25:46 1 that this occurred?

14:25:48 2 A. It couldn't have been any more than a couple of minutes.

14:25:54 3 Q. Was your friend, Michael, being arrested at this point?

14:25:58 4 A. No.

14:25:58 5 Q. And did Michael also walk with you from Jokers, from the
14:26:02 6 south, north to the cab stand?

14:26:06 7 A. Yes.

14:26:06 8 Q. All right. So now you've been swung to the ground, and you
14:26:10 9 said instantly you hit the ground. What happens next?

14:26:14 10 A. At that point I feel a drop into my knee.

14:26:18 11 Q. Into your knee --

14:26:20 12 A. Or, I'm sorry, a knee dropping into my neck.

14:26:24 13 Q. Tell me how that felt when the knee fell on your neck.

14:26:28 14 A. Excruciating. It was horrible.

14:26:31 15 Q. Is there any way that you're misremembering and a knee
14:26:34 16 wasn't actually in your neck?

14:26:35 17 A. No.

14:26:36 18 Q. You said it was excruciating. Please describe that for me.

14:26:42 19 A. It was a knee in my neck that was dropped from a standing
14:26:44 20 position to instantly in the back of my neck. It was horrible.

14:26:48 21 Q. You said it was horrible. What's going through your head at
14:26:52 22 this point?

14:26:53 23 A. Um, I'm scared. I was confused.

14:27:09 24 Q. Could you move your neck at all when the knee was on your
14:27:13 25 head?

14:27:13 1 A. No.

14:27:17 2 Q. What's the next thing you remember seeing or hearing?

14:27:22 3 A. I heard a man say, "What the fuck are you doing? You're
14:27:27 4 hurting her."

14:27:30 5 Q. And you heard that voice; correct?

14:27:32 6 A. Yes.

14:27:33 7 Q. What happens to the knee once you hear that voice?

14:27:36 8 A. It's up and off me and heading in the direction that it came
14:27:41 9 from.

14:27:42 10 Q. Let's take a step back.

14:27:45 11 Between the time you're swung to the ground and the
14:27:47 12 knee is on your neck and the time the knee comes off, do you
14:27:51 13 hear any officers give any commands?

14:27:53 14 A. No.

14:27:53 15 Q. Do you hear any officers tell somebody to back off?

14:27:56 16 A. No.

14:27:57 17 Q. Did any officer say anything to you before you were thrown
14:28:01 18 to the ground?

14:28:02 19 A. No.

14:28:02 20 Q. So now you're on the ground and the knee comes off of you?

14:28:06 21 A. Yes.

14:28:06 22 Q. How long -- well, first, you said that you had excruciating
14:28:13 23 pain to your neck?

14:28:15 24 A. Yes.

14:28:15 25 Q. Do you still have pain in your neck from that?

14:28:18 1 A. Absolutely.

14:28:19 2 Q. Could you describe that briefly?

14:28:23 3 A. My neck pain?

14:28:24 4 Q. Yeah.

14:28:25 5 A. It's constant. I take medicine for it every day.

14:28:28 6 Q. And then you said -- from the point that you hear a voice

14:28:36 7 asking why you're being physically restrained, how much time

14:28:46 8 elapses from when you hear that phrase and a knee comes off your

14:28:49 9 neck?

14:28:50 10 A. It's pretty instant.

14:28:51 11 Q. And you said that you could tell what was going on with the

14:28:54 12 person on your neck. What was that person doing?

14:28:57 13 A. Rushing. That's the best I can describe it is rushing

14:29:01 14 towards the voice.

14:29:03 15 Q. No commands, though?

14:29:04 16 A. No.

14:29:05 17 Q. What's the next thing you hear or observe?

14:29:12 18 A. After I'm laying there, I think at that point is when

14:29:22 19 somebody had to have gotten maced because there was a backdraft

14:29:27 20 that hit me in the face.

14:29:27 21 Q. Now, were you directly hit with Mace?

14:29:30 22 A. No.

14:29:30 23 Q. When you say a backdraft, how did that backdraft get to you?

14:29:35 24 A. I'm assuming that it had gotten sprayed at somebody else and

14:29:40 25 I got just a backdraft of it.

1 Q. By the wind, or do you think it was whiffed toward you?

2 A. Wind would be my assumption.

3 Q. When the pepper spray or Mace gets on you and you weren't
4 directly hit, how did you react? How did your body react?

5 A. Instantly my hands to my face, trying to get it out of my
6 eyes.

7 Q. What happened to your eyes?

8 A. Burning. My face was burning. My eyes were burning. Every
9 orifice was just running at that point.

10 Q. And how is your body at this point?

11 A. I'm in pain. I'm laying down.

12 Q. I'm sorry, you were doing what?

13 A. I'm laying down. I'm in pain.

14 Q. At any point did you pop up and try to get between the
15 person who was on your back and the voice?

16 A. No. I couldn't get up at that point.

17 Q. Well, you said you couldn't have. Why couldn't you?

18 A. I mean, I couldn't see; but also at that point, there was no
19 way I was going to move from the position that I was in.

20 Q. Why?

21 A. I had just gotten slammed to the ground. I wasn't going to
22 move.

23 Q. Before you got pepper-sprayed or maced, did you ever pop up
24 and try to get between an officer --

25 A. No.

14:30:49 1 Q. -- and try and prevent the officer from doing anything?

14:30:52 2 A. No, I did not.

14:30:53 3 Q. When the pepper spray hit you, how did that make you feel?

14:30:58 4 A. My eyes were burning, in pain, confused, disoriented.

14:31:02 5 Q. What's going through your head at this point?

14:31:04 6 A. Panic. I'm panicking.

14:31:07 7 Q. More panic than when you were thrown to the ground?

14:31:10 8 A. Yeah.

14:31:11 9 Q. Was your panic escalating?

14:31:13 10 A. Yes.

14:31:14 11 Q. Now, what are you hearing? Could you see what was going on
14:31:20 12 with the pepper spray in your face?

14:31:23 13 A. No.

14:31:25 14 Q. What do you hear is happening?

14:31:25 15 A. Just complete chaos.

14:31:30 16 Q. Do you hear any of the officers say anything?

14:31:33 17 A. No.

14:31:33 18 Q. What do you hear?

14:31:36 19 A. The only thing I hear at that point is, from what I assume
14:31:40 20 is the person who had said get off or you're hurting her, is
14:31:45 21 he's saying, "I'm not resisting, I'm not resisting."

14:31:51 22 Q. All right. What happens to you next?

14:31:52 23 A. At that point they take me to the paddy wagon.

14:31:55 24 Q. And at any point when you're pepper-sprayed and you've

14:32:00 25 already been slammed to the ground, did you get up and leave?

1 A. No.

2 Q. If you had left, would you have come back?

3 A. Absolutely not.

4 Q. Were you able to get up and leave?

5 A. No. When you get pepper spray in your eyes like that, you
6 can't -- there's no going -- you can't see to walk anywhere.

7 Q. And they take you to the wagon; correct?

8 A. Yes.

9 Q. One question to drop back. I'm sorry, I missed something.

10 When you saw the defendants, what were they wearing?

11 A. Black coats, black pants, black shoes, and black stocking
12 caps, I believe.

13 Q. From behind, did their outfits say police on them anywhere?

14 A. No.

15 Q. Standing from behind them, was there anything on their
16 outfits that identified them as police officers?

17 A. No, sir.

18 Q. How were you able to tell they were police?

19 A. I see police every night. Especially in the winter, I mean,
20 they wear black stocking caps, black jackets.

21 Q. And then it became more clear to you as you got right up
22 next to them?

23 A. Yes.

24 Q. Was there anything -- okay.

25 So you're on the ground. You said that they're taking

14:33:23 1 you to the wagon?

14:33:24 2 A. Yes.

14:33:26 3 Q. When you get to the wagon -- when is the first time that you
14:33:32 4 see Mr. Burnikel?

14:33:35 5 A. When they put him in the back of the wagon.

14:33:39 6 Q. Can you describe what he looked like when you saw him?

14:33:41 7 A. Bloody, a lot of blood, swollen.

14:33:48 8 Q. How about the way that he was standing there before by
14:33:53 9 himself?

14:33:54 10 A. Like he was hurting.

14:33:58 11 Q. When you saw Mr. Burnikel, what did that do to your anxiety
14:34:02 12 levels?

14:34:02 13 A. It shot up. I was more panicked at that point because I
14:34:06 14 couldn't believe they did it.

14:34:07 15 Q. Now, I want you to publish a picture on the Elmo.

14:34:14 16 MR. KHAZAELI: Your Honor, this is Plaintiff's
14:34:17 17 Exhibit 1. We would ask -- it has been previously agreed to,
14:34:21 18 and we would ask this be admitted into evidence.

14:34:23 19 THE COURT: Yes. All previously admitted exhibits are
14:34:26 20 admitted throughout the course of trial. You don't need to ask
14:34:29 21 for their admission, but you can for the record ask for their
14:34:33 22 publishing and identify them so the jury knows which exhibits
14:34:38 23 you're addressing.

14:34:40 24 MR. KHAZAELI: Thank you, Your Honor.

14:34:41 25 BY MR. KHAZAELI:

14:34:43 1 Q. This is Plaintiff's Exhibit 1.

14:34:43 2 Can you look at the picture?

14:34:45 3 A. Yes.

14:34:45 4 Q. Is this what Mr. Burnikel looked like when you first saw
14:34:48 5 him?

14:34:49 6 A. Yes.

14:34:49 7 Q. And how did you react to that?

14:34:51 8 A. I panicked.

14:34:53 9 Q. I'm kind of getting a reaction from you right now. Looking
14:34:56 10 at that right now, how are you reacting?

14:34:59 11 A. I don't want to look at it.

14:35:01 12 MR. KHAZAELI: Could we unpublish that, please.

14:35:03 13 THE COURT: You can also remove it from the Elmo which
14:35:06 14 would have the same effect.

14:35:08 15 MR. KHAZAELI: Actually, Your Honor, that will remind
14:35:12 16 me, I will take you to Plaintiff's Exhibit 2.

14:35:16 17 BY MR. KHAZAELI:

14:35:17 18 Q. This is a more full body view?

14:35:19 19 A. Uh-huh.

14:35:19 20 Q. Is this what he looked like when you saw him?

14:35:22 21 A. Yes.

14:35:23 22 Q. Thank you.

14:35:27 23 After you see Mr. Burnikel, what happens to you?

14:35:33 24 A. We start driving, I believe, and I'm handcuffed on my --
14:35:42 25 behind my back.

1 Q. So you're in the wagon at this point?

2 A. Yes.

3 Q. Before the wagon leaves, does anybody come to interview you
4 and ask you what happened?

5 A. No.

6 Q. Does anybody come and ask you why you were touching
7 Mr. Wessels?

8 A. No.

9 MR. HARALDSON: Objection. Relevance.

10 THE COURT: The objection is overruled.

11 Ms. Hunemiller, the attorney mentioned to you earlier
12 it's important that you wait until he finishes asking his
13 questions before you answer. I would just remind you of that.
14 He's going to ask you a question, and then make sure he's done
15 before you respond. That allows the court reporter the
16 opportunity to get everything down clearly. It also provides
17 opposing counsel the opportunity to pose any objections that
18 they think are appropriate.

19 Thank you for following the Court's instructions.

20 THE WITNESS: Sorry.

21 THE COURT: Continue.

22 MR. KHAZAELI: Thank you, Your Honor.

23 BY MR. KHAZAELI:

24 Q. Did anybody come and ask you why you had placed your hand on
25 Officer Wessels' shoulder?

1 A. No.

2 Q. Did anybody at the scene, before you left, provide you with
3 any medical attention?

4 A. No.

5 Q. Once you're in the vehicle, are you in a big room in the
6 back of the wagon with other people?

7 A. No. I'm in a -- it's like a cubby, almost like a backseat
8 to the driver and the passenger, separated from a bigger part of
9 the wagon.

10 Q. And do you know if anybody was in the other portion of the
11 wagon?

12 A. I know Dusty was. If there was anybody else, I didn't
13 notice.

14 Q. How were you positioned inside of the wagon?

15 A. Laying on my back.

16 Q. While you're laying on your back, what do you do?

17 A. I had pulled my hand out of one of the cuffs because I
18 realized my phone was in my front pocket.

19 Q. So you took your hand out of one of the cuffs and reached
20 for your phone?

21 A. Yes.

22 Q. And who did you call when you got your phone out of your
23 pocket?

24 MR. HARALDSON: Objection. Relevance.

25 THE COURT: The objection is sustained.

1 BY MR. KHAZAELI:

2 Q. When you got to the police station, how were you treated?

3 MR. HARALDSON: Objection. Relevance.

4 MR. KHAZAELI: Your Honor, this goes to her state of
5 mind and how she was feeling at that point.

6 THE COURT: Thank you.

7 The Court will allow the answer. The objection is
8 overruled.

9 BY MR. KHAZAELI:

10 Q. When you got to the police station, how were you treated?

11 A. Like a joke.

12 Q. Did anybody then ask you what happened?

13 A. No.

14 Q. Did anybody then ask you about --

15 Well, I'll strike that, Your Honor.

16 What happened that night while you were in the cell?

17 A. They put me in a holding cell --

18 MR. HARALDSON: Objection. Relevance.

19 THE COURT: Objection sustained.

20 Counsel, will you approach?

21 (Side-bar conference:

22 THE COURT: Can you explain to me where we're going
23 with this, Counsel, quietly?

24 MR. KHAZAELI: I'm going to try and be brief, but the
25 defense has made a portion of their case that Ms. Hunemiller

14:39:25 1 pled guilty the next morning. In our discussions with her and
14:39:28 2 how she testified in court was one of the reasons that she pled
14:39:31 3 guilty the next morning is she's still in a state of chaos. She
14:39:36 4 hasn't had her eyes washed. The next morning she just wants to
14:39:40 5 get out of there. So we want to ask her, because counsel made a
14:39:43 6 point in his opening argument she pled guilty, she did this.
14:39:47 7 We're going to admit she pled guilty, even proffer now that
14:39:50 8 she's going to say I pled guilty to public intoxication because
14:39:55 9 I was intoxicated; but she's going to say she pled guilty to
14:39:59 10 interference because she wanted to get out of there. She was
14:40:04 11 dazed and confused. She slept on toilet paper all night long.
14:40:08 12 And that goes to her mindset that we think is important.

14:40:12 13 MR. HARALDSON: It's *Heck versus Humphrey*. They are
14:40:15 14 trying her case through this means. She pled guilty. That's a
14:40:20 15 statement of facts. That's not an argument.

14:40:22 16 THE COURT: Counsel, you can't impeach her plea of
14:40:24 17 guilty, which I assume was made in Polk County, in the Polk
14:40:28 18 County Jail, after she was advised of her rights, and there's --
14:40:32 19 this is improper. It's basically improper impeachment.

14:40:36 20 MR. KHAZAELI: I think, Your Honor -- well, she
14:40:39 21 wasn't -- she didn't have an attorney, and she will admit that
14:40:42 22 she pled guilty to the intoxication because she was intoxicated.

14:40:50 23 THE COURT: She pled guilty to interference; correct?

14:40:55 24 MR. KHAZAELI: Yes, for the purposes of wanting to get
14:40:57 25 out of there. They told her, if you don't plead guilty, you're

1 going to stay in jail two days, and her feeling was she pled
2 guilty to get out. And you will hear our client testify that he
3 was given the same option. And I imagine that Mr. Haraldson is
4 going to come up and say -- actually try to impeach her when she
5 said I didn't interfere and say, well, actually you did.

6 THE COURT: Well, that would be proper impeachment
7 because she did plead guilty; correct?

8 MR. KHAZAELI: Right. But she should be able to
9 explain why if they're asking --

10 MR. HARALDSON: Again, that's improper impeachment.
11 She pled guilty to the charge. That's the fact. This is *Heck*
12 *versus Humphrey*. They're trying to provide an excuse for her to
13 plead guilty. Also, who is "they"? It's not Officers Fong or
14 Wessels. It's not the City of Des Moines. So who? That's --

15 MR. KHAZAELI: It was somebody with the City of Des
16 Moines. It's somebody who worked -- she said it was a jailer.

17 THE COURT: Well, you know that that's the Polk County
18 Jail, which would be a different governmental entity. I know
19 you're not from here, but these are different entities.

20 MR. KHAZAELI: Yes.

21 THE COURT: You can make an offer of proof at the next
22 break, but you can't go into this with her now.

23 You can consult.

24 (Pause.)

25 MR. KHAZAELI: And that's also the reason we wanted to

1 get into the 911 call was our point to that --

2 THE COURT: I don't know about the 911 call. I have
3 no idea who she called.

4 MR. KHAZAELI: So what she was going to testify when
5 she pulled out her phone is that she called 911, and our point
6 in that is her first reaction at this point is to call the
7 police for protection, and this goes to whether or not she's
8 biased against police officers.

9 THE COURT: Okay. Was this in your trial brief?

10 MR. KHAZAELI: The 911 tapes were submitted. We said
11 that we were going to use them in the case, and then we realized
12 for judicial -- because we didn't think that playing the sound
13 was good, that we weren't going to play them. But when we were
14 at pretrial, we did say we were planning on eliciting and
15 talking about the 911 tapes, and the 911 tapes have been
16 presented and talked about repeatedly, and they were actually
17 presented to the Court. All we said during pretrial was the
18 actual physical playing of them, including there were also some
19 other 911 calls that night, dispatch calls. And once we
20 listened to them, we realized that playing them in here you
21 couldn't tell what was going on; but we told the Court that this
22 was a portion of our case very early on.

23 MR. HARALDSON: I moved in limine to exclude them.
24 They don't involve Officers Wessels and Fong. It's not --
25 what's relevant is what they did, not what she feared and not

1 what she felt. She's not the plaintiff here. It's prejudicial
2 and it's irrelevant under 403.

3 THE COURT: So I'm not going to allow you to get into
4 the 911 call from the back of the wagon. You can make an offer
5 of proof at the next break as to issues related to why she pled
6 guilty so that you can have that on the record, but you're not
7 going to get into that in front of the jury.

8 Do you understand the Court's instructions?

9 MR. KHAZAELI: That's fine. And for the 911 tapes,
10 will we be making an offer of proof at the next time as to how
11 we believe that goes to whether she's biased against police
12 officers?

13 MR. HARALDSON: She's already testified that she loves
14 police officers.

15 THE COURT: To the extent that it has any probative
16 value at all, it is far overcome by a potential for prejudice.
17 It's not -- the relevance here is extremely limited. There's no
18 question as to what her viewpoint is. Her testimony on that has
19 been linked. Any probative value of the call to 911 as for
20 purposes of bias is negligible at best.

21 MR. KHAZAELI: Thank you, Your Honor.)

22 (In open court.)

23 THE COURT: Mr. Khazaeli, you may continue.

24 MR. KHAZAELI: Thank you, Your Honor.

25 BY MR. KHAZAELI:

14:45:25 1 Q. Ms. Hunemiller, the next morning you were let out of your
14:45:29 2 cell; correct?

14:45:29 3 A. Yes, sir.

14:45:30 4 Q. And where were you taken?

14:45:31 5 A. We were taken to the middle of that building. I would say
14:45:38 6 it was surrounded by cells, and they sat women on one side and
14:45:42 7 men on the other to wait to see a judge.

14:45:44 8 Q. And that morning did you see Mr. Burnikel?

14:45:50 9 A. Yes.

14:45:51 10 Q. And how did he look the next morning?

14:45:54 11 A. Worse than he did the night before.

14:45:55 12 Q. When you say worse, can you describe that?

14:45:58 13 A. His face was completely swollen, worse than it was. He
14:46:04 14 slumped. He looked like he was in a lot of pain.

14:46:06 15 Q. That picture that I showed you earlier, did he look worse
14:46:10 16 than that picture?

14:46:11 17 A. Way worse.

14:46:12 18 Q. Was there a difference in the amount of blood that was on
14:46:15 19 him the next morning?

14:46:17 20 A. Just that it was dry.

14:46:20 21 Q. You said he was slumped over. Can you describe that?

14:46:24 22 A. Slumped in pain. I don't know how else to describe it.

14:46:30 23 Q. And about how many hours after the incident is this?

14:46:34 24 A. I don't know.

14:46:46 25 Q. But it was the next morning, though?

14:46:48 1 A. Yes.

14:46:51 2 Q. Now, overall, that morning when you were thinking about what
14:46:57 3 happened to you, what was going through your mind?

14:46:59 4 A. I just wanted to go home. I wanted it to be over.

14:47:08 5 Q. And eventually you saw a judge?

14:47:11 6 A. Yes.

14:47:12 7 Q. Past that, when was the next time you spoke to Mr. Burnikel?

14:47:20 8 A. Before I went to court.

14:47:23 9 Q. When you said court, not that day? Are you talking about
14:47:26 10 later on?

14:47:26 11 A. Later on.

14:47:27 12 Q. And was that for Mr. Burnikel's criminal trial?

14:47:31 13 A. Yes, sir.

14:47:32 14 Q. Now, you're from Waverly, and you didn't know Mr. Burnikel
14:47:36 15 ahead of time; correct?

14:47:37 16 A. No, sir.

14:47:39 17 Q. Why did you decide to go to court and testify on
14:47:43 18 Mr. Burnikel's behalf in his criminal trial?

14:47:46 19 A. Because what had happened was wrong. It shouldn't have
14:47:51 20 happened.

14:47:52 21 Q. What do you mean by that?

14:47:55 22 A. The whole situation shouldn't have taken place. Nobody did
14:48:00 23 anything wrong.

14:48:01 24 Q. When you say nobody did anything wrong, who are you talking
14:48:04 25 about didn't do anything wrong?

14:48:06 1 A. Dusty and I didn't do anything wrong.

14:48:13 2 Q. Now, you now live in Florida; correct?

14:48:17 3 A. Yeah.

14:48:17 4 Q. Was it easy for you to come testify?

14:48:20 5 A. No.

14:48:22 6 Q. Why was it difficult?

14:48:24 7 A. I'm a broker. I have clients that I have to take care of,
14:48:29 8 and I've got new prospects that I have to look for. I have a
14:48:33 9 business to run. I have my seven-year-old son. I just --

14:48:41 10 Q. Do you get paid by your company for coming --

14:48:41 11 A. No.

14:48:45 12 Q. -- here?

14:48:45 13 A. Sorry.

14:48:50 14 Q. So why did you come all the way from Florida to testify in
14:48:54 15 court today?

14:48:55 16 A. Because, again, it was wrong what happened. It shouldn't
14:48:58 17 have happened, and I don't want it to happen again.

14:49:00 18 Q. When you say you don't want it to happen again, what are you
14:49:03 19 afraid of?

14:49:04 20 A. That Officers Fong and Wessels will do it again.

14:49:08 21 Q. When you're in court in the criminal case and you saw
14:49:12 22 Officers Fong and Wessels, how did that make you feel when you
14:49:15 23 saw them?

14:49:16 24 MR. HARALDSON: Objection. Irrelevant.

14:49:20 25 THE COURT: The objection is overruled.

1 A. Uncomfortable, scared.

2 BY MR. KHAZAELI:

3 Q. Five plus years later, sitting in court today and looking at
4 Officers Fong and Wessels, how do you feel?

5 A. Uncomfortable.

6 Q. How did this whole thing, this whole incident affect you?

7 MR. HARALDSON: Objection. Irrelevant.

8 THE COURT: The objection is sustained.

9 MR. KHAZAELI: No further questions, Your Honor.

10 THE COURT: Members of the jury, we're going to take
11 our afternoon break at this time. It is 2:50. I will ask you
12 to be ready to come back into court -- we're going to take a
13 little bit of a longer break -- at 3:15. If there's any delay
14 longer than that, I'll have my law clerk come and tell you.
15 Otherwise, please be prepared to come back into the courtroom at
16 3:15.

17 Again, please continue to remember the admonition of
18 the court. As I stated before, you can leave your notebooks
19 here on your chairs, and we will keep them safe. These will be
20 your seats when you return.

21 Thank you. We're in recess.

22 (In open court, out of the presence of the jury.)

23 THE COURT: Please be seated.

24 We're outside the presence of the jury.

25 Mr. Khazaeli, you had an offer of proof you wanted to

1 make in regards to the circumstances surrounding her plea?

2 MR. KHAZAELI: Your Honor, can we -- are you out of
3 tissue?

4 THE WITNESS: No. I've got some.

5 THE COURT: There's actually tissues right there. Is
6 that box empty?

7 MR. KHAZAELI: Looks like she's out.

8 THE COURT: I can certainly give you more. Can you
9 hand me that, Ms. Hunemiller?

10 There you go, ma'am.

11 THE WITNESS: Thank you.

12 THE COURT: Okay. The objection was made in regards
13 to the phone call and then in regards to the circumstances
14 surrounding the plea. Looking back at the materials you
15 submitted, I don't -- and the motions in limine that were filed
16 in regards to the plea, and certainly there wasn't a 104(A)
17 motion about the admissibility of it filed in regards to this
18 portion of the testimony; but to the extent that you want to
19 make a record and for the Court's consideration of whether or
20 not this material is relevant and permissible, you can make your
21 record at this time.

22 MR. KHAZAELI: Thank you, Your Honor.

23 Could I have one second?

24 THE COURT: Yes.

25 (Pause.)

1 THE COURT: If you can point me to anywhere in the
2 docket where I was advised of this issue, I would appreciate it.

3 MR. KHAZAELI: We will look through, Your Honor.
4 We'll look through.

5 I will flag what, Your Honor, that this piece of
6 evidence was initially -- I'll go back and find it, but it was
7 initially one of the exhibits that we initially presented to the
8 Court and then had withdrawn because of the use of the audio,
9 when we decided we weren't going to use audio equipment.

10 THE COURT: You just withdrew it, though. I remember
11 there --

12 MR. KHAZAELI: I don't believe that we -- I think we
13 identified it at the time that it was the 911 tape, but I do not
14 believe that we had any long conversations about that, Your
15 Honor.

16 THE COURT: Let's use our time wisely, Counsel. Go
17 ahead and make your offer of proof.

18 BY MR. KHAZAELI:

19 Q. Ms. Hunemiller, I'm going to take you back to when you were
20 in the wagon and you said that you were able to loosen your hand
21 from the handcuffs. What did you do with your hands?

22 A. I pulled my cell phone out of my pocket and called 911.

23 Q. Why did you call 911?

24 A. Because I knew we needed help.

25 Q. But after what happened to you, why was your first reaction

1 to call the police department?

2 A. Because I was hoping that there was other police officers
3 that would help.

4 Q. So is it fair to say that at that time you didn't have a
5 bias against police officers generally?

6 A. I still don't.

7 Q. Let's move to what happened the morning that you left the
8 jail. You were taken into court; correct?

9 A. Yes, I was.

10 Q. And before you went into court, were you able to speak to an
11 attorney?

12 A. No.

13 Q. Was there anybody there advising you of your rights?

14 A. No.

15 Q. Did anybody tell you about what would happen or could happen
16 in court?

17 A. Um, there was an officer that said that if I chose to plead
18 not guilty, that I would stay over the weekend to see a judge on
19 Monday.

20 Q. And what did the officer say would happen if you pled
21 guilty?

22 A. That I could go home.

23 Q. Now, when you got in front of the judge, you had two charges
24 in front of you. One was public intoxication. How did you
25 plead to that?

14:55:04 1 A. I pled guilty to public intoxication.

14:55:07 2 Q. Why did you plead guilty to public intoxication?

14:55:09 3 A. Because I was in public and I did have drinks.

14:55:12 4 Q. Then you also pled guilty to interfering with public acts;
14:55:20 5 correct?

14:55:20 6 A. Yes, sir.

14:55:21 7 Q. Now, earlier in my examination, you told me that you never
14:55:25 8 interfered with anybody; right?

14:55:27 9 A. That is correct.

14:55:28 10 Q. Can you explain why you have that difference in your
14:55:31 11 testimony?

14:55:32 12 A. I wanted to go home. I didn't want to be there anymore. I
14:55:36 13 wanted my mom, and I just wanted it to all be over.

14:55:40 14 Q. And were you scheduled to work that night?

14:55:43 15 A. Yes.

14:55:43 16 Q. What would have happened to you if you had missed work that
14:55:46 17 night because you were in jail?

14:55:48 18 A. I could very well have gotten fired for it.

14:55:51 19 Q. How would that have affected you?

14:55:53 20 A. I had a little boy at the time, I had a son. I had rent to
14:55:57 21 pay.

14:55:58 22 Q. Now, what did you think would happen if you tried to fight
14:56:02 23 the public intox -- the interfering with public acts charge?

14:56:07 24 A. I think there would have been no point after what had just
14:56:11 25 happened. I don't think --

1 Q. Why do you think there wouldn't have been any point?

2 A. Because what happened shouldn't have happened, and I don't
3 think that I would have been given a fair chance.

4 MR. KHAZAELI: No further questions, Your Honor.

5 THE COURT: Anything in terms of the offer of proof
6 you would like to make a record about, Mr. Haraldson?

7 MR. HARALDSON: No. I'll stand on my legal argument.

8 THE COURT: The Court's prior rulings remain in
9 regards to the relevancy of the 911 call. That line of
10 questioning doesn't have any relevance. To the extent it is
11 relevant, it confuses the issue and would be inadmissible under
12 403.

13 The fact of the plea certainly can come in.
14 Otherwise, the Court's ruling remains the same. It's improper
15 to impeach the prior plea in this manner. You certainly can ask
16 questions about it. I assume there will be some questions on
17 cross-examination about this, and you can ask questions in
18 redirect to the extent that they're relevant to the testimony
19 that the defense elicits on their cross-examination, but
20 otherwise it's not appropriate.

21 Do you have any additional questions you want to ask
22 of this witness before we turn over for cross-examination, in
23 light of the Court's ruling and the record that was made?

24 MR. KHAZAELI: No, Your Honor.

25 THE COURT: Then is there anything further on behalf

1 of the plaintiff at this time in regards to the offer of proof?

2 MR. KHAZAELI: No, Your Honor.

3 THE COURT: Anything that you need to bring to the
4 Court's attention before I allow you a brief recess as well?

5 Mr. Khazaeli?

6 MR. KHAZAELI: Sorry?

7 THE COURT: Anything else you need to bring to the
8 Court's attention?

9 MR. KHAZAELI: Not at this time.

10 THE COURT: Mr. Haraldson?

11 MR. HARALDSON: No, Your Honor.

12 THE COURT: Okay. My records show that the plaintiff
13 withdrew Exhibits 19 and 26, the dispatch calls. That's the
14 only thing that I see. I recognize that there was a switch of
15 judges in this, and so I acquainted myself with the materials
16 that have been brought to my attention. To the extent that they
17 haven't been brought to my attention, there's nothing I can do
18 about that. So if there are any issues that you think that I'm
19 going to need to know about that have not been briefed, you need
20 to let me know about them so that I can address them as timely
21 as I can.

22 MR. KHAZAELI: And we'll continue to review, but at
23 this time I haven't seen anything.

24 THE COURT: Okay. So it's 3 o'clock now. I had asked
25 the jury to be ready at 3:15, if you guys are ready to go at

1 3:10.

2 Ms. Hunemiller, while we are on recess, you can't talk
3 to anyone. You can't consult in terms of the continuation of
4 your testimony, but you can also take a break and use the rest
5 room and whatever you need to. I'll ask you to be back on the
6 stand at 3:10 as well.

7 Thank you. We'll be in recess.

8 (Recess at 3:00 p.m., until 3:18 p.m.)

9 THE COURT: Thank you. Please be seated.

10 I believe I've been informed that the technical issues
11 have been resolved; is that correct?

12 MR. KHAZAELI: Yes, Your Honor. I think that if
13 there's anything outstanding, it won't be until tomorrow.

14 THE COURT: Okay. Anything you need to bring to the
15 Court's attention then on behalf of the plaintiff?

16 MR. KHAZAELI: No, Your Honor.

17 THE COURT: On behalf of the defendants?

18 MR. HARALDSON: No, Your Honor.

19 THE COURT: Okay. We'll bring in the jury.

20 (In open court, in the presence of the jury.)

21 THE COURT: Thank you. Please be seated.

22 We're back on the record, in the presence of the jury,
23 in the case of Dustin Burnikel versus Michael Fong, Gregg
24 Wessels, and City of Des Moines, Case No. 4:15-cv-50.

25 Cross-examination, Mr. Haraldson?

MR. HARALDSON: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. HARALDSON:

Q. Ms. Hunemiller, you described on the night of the 15th, early morning of the 16th, that you were in four different locations that evening after the wrestling tournament; right?

A. Yes, sir.

Q. You were at a banquet room in a hotel. Do you remember the hotel?

A. I don't remember the name.

Q. Did you have any alcoholic beverages at the banquet room?

A. No, sir.

Q. Then you went to a bar. And you don't remember the name of the bar; right?

A. No, sir.

Q. And you had -- I believe your testimony is that you had a drink there; is that right?

A. Yes, sir.

Q. Do you remember what you drank?

A. It would have been beer of some sort.

Q. Is that what you usually drink, beer? You know don't drink mixed drinks?

A. That's correct.

Q. So any alcoholic beverages you had on the night of the 15th/16th would have been beer?

1 A. I believe so. I'm not really sure.

2 Q. Okay. Is it possible you had something else besides beer to
3 drink? You had beer and something else, I should say?

4 A. It's a possibility. I'm not sure.

5 Q. Okay. And then you went to another bar. Do you remember
6 whether you had anything to drink at that bar?

7 A. Yes.

8 Q. And how much did you have to drink at that bar?

9 A. I believe I had a couple there.

10 Q. A couple beers?

11 A. Yes, sir.

12 Q. Do you remember the name of that other bar?

13 A. No, sir.

14 Q. Okay. Then you went to Jokers; right?

15 A. Yes, sir.

16 Q. So you would have had three beers by the time you went to
17 Jokers; right?

18 A. Yes.

19 Q. And then you were at Jokers for about almost two hours?

20 A. Yes.

21 Q. I believe your testimony was that you got there around
22 midnight and you stayed until it closed pretty much; right?

23 A. Yes, sir.

24 Q. And you had something -- you had at least a beer at Jokers;
25 right?

1 A. That's correct.

2 Q. And how many beers do you think you had at Jokers?

3 A. One, I believe.

4 Q. Okay. Because in your earlier testimony, you thought you
5 had about five -- you said five drinks that night.

6 A. It was six years ago. I'm not sure, sir.

7 Q. Nonetheless, by the time you went to the cab stand, you
8 would agree you were intoxicated?

9 A. I would say I was buzzed.

10 Q. You pled guilty to public intoxication; correct?

11 A. Yes, sir.

12 Q. And you also pled guilty to interference with the police
13 officers; correct?

14 A. Unfortunately, yes.

15 Q. Well, that's not an unfortunately question, ma'am. It's a
16 yes or no. Did you or did you not plead guilty to public
17 interference?

18 A. Yes, I did.

19 Q. And you were -- at the time that you were at the cab stand,
20 you were with your friend, Mike?

21 A. Yes, sir.

22 Q. And you said Mike is a high school friend, so I take it he's
23 about your age?

24 A. Yes.

25 Q. And in 2013, you were 25; is that right?

1 A. I was 26.

2 Q. 26. And at least in 2013, I know, for example, I had more
3 hair, just illustrious amounts of hair in 2013 which I don't
4 have anymore. But in 2013, what was Mike's appearance? How
5 tall was he? Did he have hair? What color was his hair, that
6 sort of thing?

7 A. Mike didn't have any hair.

8 Q. So he had a shaved head?

9 A. Yes, sir.

10 Q. And how tall was he?

11 A. Mike is my height.

12 Q. And you are?

13 A. Five-nine and a half.

14 Q. And then if I understand it right, you never actually saw
15 what occurred between Mr. Burnikel and the officers? You never
16 actually saw the arrest event, so to speak; correct?

17 A. I didn't see anything, but I heard.

18 Q. And the question was whether you saw it. You never saw the
19 event; correct?

20 A. I didn't see anything, but I heard.

21 Q. Thank you.

22 You said you went down on the pavement face first.
23 Did you have any facial abrasions?

24 A. I didn't -- I went face down. I didn't hurt my face. It
25 was my knees and my shins.

1 Q. Did anybody grind your face into the cement?

2 A. No, sir.

3 Q. And you had no doubt from your observation that Fong and
4 Wessels were police officers?

5 A. Yeah, I knew they were.

6 Q. Did they have patches on their shoulders?

7 A. Not that I saw.

8 Q. How did you know they were police officers?

9 A. One, when you're attracted to men in uniform, you tend to
10 spot those kind of things.

11 Q. Right. So from your observation, they're police officers,
12 not firemen or sailors?

13 A. Correct.

14 Q. Your testimony earlier was that you were, I believe you
15 described it as slammed on your face; is that correct?

16 A. I believe I meant slammed face down, not on my face.

17 Q. In fact, what you landed on first were your knees and shins;
18 correct?

19 A. That's correct.

20 Q. And what you heard is you said you did hear an interaction
21 between someone and the officers; right?

22 A. Yes, sir.

23 Q. And I believe your quote was you heard someone yell -- and
24 they were yelling; correct?

25 A. I wouldn't say it was a yell. It was a surprise.

1 Q. And I believe your testimony was someone yelled, "What the
2 fuck are you doing?"

3 A. That's correct.

4 Q. Were you able to judge how far away that voice was coming
5 from?

6 A. Not very far. Five feet. Maybe five, six feet away.

7 Q. So it was close to you and the officer that you say was on
8 top of you?

9 A. It was close by, yes.

10 Q. And during this whole event, you stayed face down; is that
11 right? You continued to lie down?

12 A. Yes, sir.

13 Q. Face down?

14 A. Face down.

15 Q. And, as far as you could tell, was the interaction
16 between -- that was going on, the person that was yelling, was
17 that behind you?

18 A. If I'm laying face down, it was in this direction
19 (indicating).

20 Q. And am I correct that you were -- at the time you were face
21 down, where were you? Were you in the parking ramp? Were you
22 on the sidewalk? Were you between? Where were you laying down?

23 A. To my knowledge, I was on the sidewalk.

24 Q. Were you close to the parking ramp?

25 A. Not very close.

1 Q. And what direction was your head facing: East, west, north,
2 south?

3 A. I don't remember.

4 Q. And so whatever perspective your head was, can you tell me
5 again, from your hearing, where was this sound coming from, from
6 what angle to your head?

7 A. Behind me.

8 Q. And your testimony is that somehow you got Mace on you; is
9 that right?

10 A. Yes.

11 Q. And was it a windy night?

12 A. I don't remember.

13 Q. And you didn't see the pepper spray or Mace, or whatever it
14 was, you didn't see it actually deployed; correct?

15 A. No, sir.

16 Q. Did you hear it deployed?

17 A. No, sir.

18 Q. So you don't know the nature of the manner in which the Mace
19 was distributed, whether it was a spray or a stream, or anything
20 like that?

21 A. No, sir.

22 Q. Where did you -- where did the Mace end up on you, on your
23 body?

24 A. In my face. My eyes mostly.

25 Q. And was that because it got directly into your eyes or

1 because it got on your hands and then you touched your eyes?

2 A. No. It was like a mist that hit my face. My hands

3 immediately went up to wipe it off my eyes.

4 Q. And you did hear one other thing coming from a voice with

5 the words, "I'm not resisting, I'm not resisting"; correct?

6 A. Yes, sir.

7 Q. And was it from the same voice that yelled to the officers,

8 "What are you" -- expletive -- "doing?"

9 A. Yes. It was the same voice, but more strained and sounded
10 like he was in pain.

11 Q. And is it -- and did you hear what the voice that was saying
12 that was responding to? Was someone talking to him that you
13 recall?

14 A. No, sir.

15 Q. Is it possible that someone was talking to him and you just
16 don't remember?

17 A. I don't remember.

18 Q. And you agree, do you not, that alcohol can affect a
19 person's perception?

20 A. I agree that alcohol can affect people's perception, yes.

21 Q. And you agree it can also affect a memory of an event?

22 A. I do agree that can happen.

23 Q. And at some point you state -- your testimony is you stayed
24 on the ground the whole point until -- the whole time until one
25 of the officers escorted you to the van?

1 A. Yes, sir. I wasn't going to dare move at that point.

2 Q. Give me just a second here.

3 You've got a book up there. It's green. It's called
4 Misdemeanor Transcript; is that right?

5 A. Yes, sir.

6 Q. If you can turn to page 174. Just keep your thumb there.

7 Do you agree that you testified at Mr. Burnikel's
8 misdemeanor trial in May of 2013?

9 A. What was the question? I'm sorry.

10 Q. Do you remember that you testified in Mr. Burnikel's
11 misdemeanor trial in May of 2013?

12 A. Yes, sir.

13 Q. And if you would just keep your page on 174, on page 165, is
14 that a reference to your testimony, the beginning of your
15 testimony in that trial?

16 A. Yes, sir.

17 Q. And you would agree that that was about -- that testimony
18 occurred about five-and-a-half years ago?

19 A. Yeah.

20 Q. And it would have been about two months after -- or
21 two-and-a-half months after the event with yourself and
22 Mr. Burnikel and the officers on February 16, 2013?

23 A. Yes, sir.

24 Q. Actually almost three months; right?

25 A. Uh-huh.

1 Q. Now if you could turn to 174.

2 Starting on line 15, you're asked: "Did you see what
3 happened to Dustin Burnikel after the officer left you and maced
4 him?"

5 And your answer was?

6 A. "No."

7 Q. And then you were asked: "Where were you?"

8 And your answer was?

9 A. "I was in the parking garage, they were taking me into the
10 paddy wagon at that point."

11 Q. Okay. So were you taken to the paddy wagon right after the
12 macing?

13 A. I don't remember.

14 Q. Now, how many officers do you recall being down there?

15 A. Down where, sir?

16 Q. At the parking garage -- I mean at the cab stand?

17 A. Two.

18 Q. And you didn't see their physical interaction with

19 Mr. Burnikel?

20 A. No, sir.

21 Q. But you didn't just go to the paddy wagon by yourself, did
22 you?

23 A. No, sir.

24 Q. Someone, one of the officers, escorted you; correct?

25 A. That's correct.

1 Q. Now, that didn't happen -- is it your belief that that
2 happened just after Mr. Burnikel was maced?

3 A. No, sir.

4 Q. Okay. So I'm just trying to again figure out where you
5 were. Were you actually in the parking garage at the time that
6 the officer would have left you to interact with Mr. Burnikel?

7 A. No, sir. I was on the sidewalk.

8 Q. So I'm just trying to -- can you explain to me when you're
9 asked --

10 MR. KHAZAEI: Objection, Your Honor. Improper
11 impeachment.

12 MR. HARALDSON: It's really not impeachment. I'm
13 trying to explain -- have her explain what happened that night
14 to see if I can harmonize her current testimony with her
15 testimony in May of 2013.

16 THE COURT: Under what rule of evidence are you
17 proceeding, Counsel?

18 MR. HARALDSON: Well, this would be, I believe, sworn
19 testimony, so 802, I believe.

20 THE COURT: You may proceed. The objection is
21 overruled.

22 Please pose another objection if you believe it's
23 appropriate.

24 BY MR. HARALDSON:

25 Q. Ms. Hunemiller, just correct me, I'm just trying to

1 understand here, it reads like you were being -- do you agree it
2 sort of reads like you're being escorted to the wagon while
3 Mr. Burnikel is in the process of interacting with an officer or
4 officers away from you?

5 A. That's not what happened. I was on the ground the entire
6 time.

7 Q. Do you know what happened to your friend, Mike, that night?
8 He was with you when you were at the cab stand, and then he sort
9 of falls out of the story. Do you have any idea what happened
10 to him?

11 A. I have no idea.

12 Q. Well, did you ever see him again? You must have seen him
13 again, I imagine?

14 A. I saw him briefly after my mother had picked me up, and I
15 went straight home.

16 Q. Okay. But you have no idea whether he hung around there or
17 cleared off at the time you were taken to the van?

18 A. I think I would have seen him if he had hung around.

19 Q. So, from your observation or recollection, he was gone?

20 A. Yes, sir.

21 MR. HARALDSON: That's all I have.

22 Thank you.

23 THE COURT: Redirect?

24 MR. KHAZAELI: Yes, Your Honor.

25

1 REDIRECT EXAMINATION

2 BY MR. KHAZAELI:

3 Q. You just testified that -- you were asked a question about
4 how far away the person was when they yelled, "What's happening
5 to you?"

6 A. Yes, sir.

7 Q. And you said that you thought that person was five to six
8 feet away; correct?

9 A. That's a rough guesstimate. I'm not sure.

10 Q. But you're making that determination right now as to how far
11 away they are based on sound, not by sight?

12 A. By sound.

13 Q. Are you trained in any way to tell how far away somebody is
14 from you based on sound?

15 A. Not in freight brokerage, no.

16 Q. In your previous testimony, how far away was the wagon from
17 the area where you were face down on the ground, approximately?

18 A. It was in the paddy -- or it was in the parking garage, so I
19 don't -- I'm not very good at distance.

20 Q. Well, was it directly next to it, or was it farther away?

21 A. It was farther away.

22 Q. If you were standing by the wagon and somebody was maced at
23 the area where you were laying down, could that Mace have gotten
24 on you?

25 A. No.

1 Q. So when you were maced, it's not when you were near the
2 paddy wagon?

3 A. No.

4 Q. And when you were by the wagon, that's not when Mr. Burnikel
5 was maced?

6 A. No.

7 MR. KHAZAELI: No further questions, Your Honor.

8 THE COURT: Recross limited to redirect?

9 MR. HARALDSON: No, Your Honor.

10 THE COURT: Thank you.

11 Ms. Hunemiller, thank you for your time. You may step
12 down.

13 Ma'am, would you mind taking your glass with you?

14 THE WITNESS: Yes; sorry.

15 THE COURT: Thank you.

16 (Witness excused.)

17 THE COURT: Plaintiff?

18 MR. KHAZAELI: Your Honor, could I take the
19 transcripts and return them to defendants' counsel?

20 THE COURT: Yes. Thank you.

21 Would you call your next witness, please.

22 MR. KHAZAELI: Yes, Your Honor. We'll be calling
23 Darrick Burnikel.

24 THE COURT: Thank you.

25 Thank you, sir. If you would please come forward,

1 walk through this way. Thank you, sir. Please come forward.

2 If you would please pause and raise your right hand and prepare
3 to be sworn.

4 DARRICK BURNIKEL, PLAINTIFF'S WITNESS, SWORN

5 THE COURT: Thank you, sir. You may be seated.

6 Sir, would you please state and spell your full name
7 for the record.

8 THE WITNESS: Darrick Burnikel, D-A-R-R-I-C-K
9 B-U-R-N-I-K-E-L.

10 THE COURT: Thank you, sir.

11 Your witness, Counsel.

12 MR. SWAIM: Thank you, Your Honor.

13 DIRECT EXAMINATION

14 BY MR. SWAIM:

15 Q. Mr. Burnikel, how old are you?

16 A. I am 42.

17 Q. And what do you do for a living?

18 A. Farm and sell crop insurance and seed corn.

19 Q. Where do you live?

20 A. Cresco, Iowa.

21 Q. Have you lived in Cresco, Iowa, most of your life?

22 A. Yes, I have.

23 Q. Are you related to the plaintiff, Dustin Burnikel, in this
24 case?

25 A. Yes.

1 Q. How are you related to him?

2 A. Cousins.

3 Q. I want to call your attention to the time frame from around
4 February 14th to February 16th of 2013. Do you recall where you
5 were on those dates?

6 A. Yes. I was down to the State Wrestling Tournament in
7 Des Moines.

8 Q. Okay. And you said you were down at the State Wrestling
9 Tournament in Des Moines. Who was with you?

10 A. My cousin, Don Burnikel; some of his grandsons; and Dusty
11 was down there. But I rode down with Don Burnikel and Drew
12 Rasmussen.

13 Q. And Don Burnikel is Dustin's father; is that correct?

14 A. Yes.

15 Q. And why were you coming down to the State Wrestling
16 Tournament on that date?

17 A. My cousin's son was wrestling at the tournament and it's
18 something that I normally love to watch, so --

19 Q. And what was that relative's name that was wrestling at the
20 tournament?

21 A. Tyler Thomas.

22 Q. And did you come down to the State Wrestling Tournament on
23 Thursday, the 14th?

24 A. Yes; correct.

25 Q. Did you watch wrestling that date?

1 A. Yes.

2 Q. All day long?

3 A. Yeah. We get here in the afternoon and watched the first
4 rounds.

5 Q. And where did you stay that night?

6 A. Embassy Suites.

7 Q. And did you return to the State Wrestling Tournament the
8 following day, Friday, the 15th?

9 A. Yes.

10 Q. And did you watch wrestling all of that day?

11 A. Yes.

12 Q. What time in the morning did you start watching wrestling
13 that day?

14 A. I don't recall what session we started at, but it primarily
15 takes up your whole day, and we continue to watch. Friday night
16 is the semifinals. That's always the most exciting round to
17 watch. So we stayed through that until, probably ended around
18 10:00, 10:30.

19 Q. 10:00, 10:30 at night?

20 A. Yes.

21 Q. And what did you do after you left the State Wrestling
22 Tournament at 10:00 or 10:30 that night?

23 A. Walked back to the Embassy Suites.

24 Q. Who was with you when you walked back to the Embassy Suites?

25 A. I don't really recall. I mean, there's hundreds of people

1 from our town, you know, small -- I don't know, a lot of locals.
2 Just walking with Don and Drew. I can't recall who I
3 specifically walked --

4 Q. A lot of people from your hometown?

5 A. Yeah. The whole hometown is a wrestling community there.

6 Q. And you said you went back to the Embassy Suites; is that
7 correct?

8 A. Yes.

9 THE COURT: Mr. Burnikel, something that you need to
10 do is make sure you wait until the attorney finishes asking his
11 question.

12 THE WITNESS: Oh.

13 THE COURT: And then answer it so we can all hear you
14 correctly and so the record can be taken down accurately. Can
15 you do that?

16 THE WITNESS: Yes. I'm sorry.

17 THE COURT: That's okay. Thank you very much.

18 BY MR. SWAIM:

19 Q. And you mentioned that a lot of people from Cresco were
20 walking back to the Embassy Suites. Were they all staying there
21 at the Embassy Suites as well?

22 A. Yes. There's a major share of them that stay there.

23 Q. And was Dusty, Dustin Burnikel, staying there as well?

24 A. Yes, he was.

25 Q. Along with his dad and son?

1 A. Yes.

2 Q. And about what time did you get back to the Embassy Suites?

3 A. I'm just guessing roughly around that 10 o'clock to 10:30.

4 Q. And what did you do then when you got back to the Embassy
5 Suites?

6 A. A lot of the, you know, friends will gather in the lounge
7 area, or whatever, they have free hors d'oeuvres and had a drink
8 there and discussed the previous night or day's wrestling.

9 Q. And who was with you in the lounge at the Embassy Suites
10 that night?

11 A. At that time I was with primarily Justin Sovereign, a local
12 friend.

13 Q. A friend from Cresco?

14 A. Yeah.

15 Q. Was he also down for the State Wrestling Tournament?

16 A. Yes, he was.

17 Q. Where was Dustin Burnikel at that time?

18 A. I believe he was getting pizza for his son, and if he had --
19 whoever was staying in his room, the younger people.

20 Q. So did Dusty have any drinks with you there at the Embassy
21 Suites?

22 A. I don't recall if he did or not, to be honest with you.

23 Q. How many drinks did you have at the Embassy Suites?

24 A. I may have had two.

25 Q. And had you been drinking at any time prior that day?

1 A. No, I had not, was not.

2 Q. What happened next?

3 A. Me and Justin, like I said, we were talking to a lot of the
4 other locals. Dusty come down, met with us, and then we
5 decided -- I think it was Dustin's idea to go to the
6 establishment called the Bait Shop, he was more familiar with
7 it, just to maybe get away from some of the crowd.

8 Q. What time did you decide to go to the Bait Shop that night?

9 A. I would say -- I know we weren't at the hotel that long, but
10 I would suppose it was anywhere between 11:30 to 12:00, I would
11 say.

12 Q. And you said you went -- did you go straight from the
13 Embassy Suites to the Bait Shop?

14 A. Yes, we did.

15 Q. How did you get there?

16 A. We were going to get a cab, but actually the Domino's Pizza
17 delivery man that Dusty had deliver the pizza was there, and we
18 just happened to ask him, and he said he was going right by
19 there, so he dropped us off.

20 Q. Who all was with you when you went to the Bait Shop?

21 A. It was me, Dustin, and Justin.

22 Q. And what happened next when you got to the Bait Shop?

23 A. Just the three of us walked in. The establishment was, I
24 would call it kind of slow, I mean not very populated. The
25 three of us discussed wrestling. I recall we were discussing

1 Cresco switching coaches, strictly wrestling talk, and going
2 over the day's events.

3 Q. And was it just the three of you sitting talking or were
4 there others sitting with you?

5 A. It was primarily just the three of us. There was other
6 people there obviously, but nobody we were interacting with.

7 Q. How long were you at the Bait Shop?

8 A. We were there until they called last call.

9 Q. And do you recall around what time that would have been?

10 A. I'm assuming 1:30.

11 Q. How many drinks did you have at the Bait Shop?

12 A. I would say we had three at the most.

13 Q. And do you think all three of you had around the same
14 amount?

15 A. I can't be -- I presume so, yeah.

16 Q. That's what you had?

17 A. Yeah. And we were, like I said, just socializing.

18 Q. After they called last call at the Bait Shop, what happened
19 next?

20 A. I know one of us asked to -- you know, asked the bartender
21 if he would call us a cab, and that's when he directed us that
22 they don't call cabs, you just go down the street to the cab
23 stand and, you know, find a cab there.

24 Q. And so I think you testified that you had had a couple of
25 drinks at the Embassy Suites and then perhaps three drinks at

1 the Bait Shop; is that correct?

2 A. As I recall, I would say, you know, one to two at the
3 Embassy and maybe three at the Bait Shop. Who knows if we
4 finished the last one.

5 Q. Were you intoxicated when you left the Bait Shop?

6 A. No.

7 Q. Was Dusty intoxicated when he left the Bait Shop?

8 A. No. None of us were.

9 Q. So where did you go next?

10 A. Given the bartender's directions, we went -- you know, we
11 had to walk a few blocks. It was very cold that night. So we
12 were proceeding down the street, and there was an entryway into
13 an establishment, I believe it was called Jokers, just kind of a
14 front porch thing. We ducked in there to warm up for a few
15 minutes. That establishment was kind of telling everybody they
16 had to get moved --

17 Q. Was it just the three of you walking from Bait Shop to
18 Jokers?

19 A. I would say -- I mean, it was us three and a group. I mean,
20 there was people ahead or behind us.

21 Q. Were there people in the entryway of Jokers?

22 A. There was -- excuse me. There was a few in the entryway.

23 Q. Anyone else you knew besides Dustin and Justin?

24 A. No.

25 THE COURT: Counsel, would you wait until he finishes

1 before you ask your next question. The same rule applies to
2 you.

3 MR. SWAIM: I'm sorry. I understand, Your Honor.
4 Thank you.

5 THE COURT: Thank you.

6 BY MR. SWAIM:

7 Q. How long were you in the entryway at Jokers?

8 A. I would say less than, you know, three to five minutes.

9 Q. Could you see the cab stand from where you were in the
10 entryway at Jokers?

11 A. Yes, we could.

12 Q. And were there people in line at the cab stand at that time?

13 A. Yes, there was.

14 Q. Tell us what happened next.

15 A. We proceeded across the street to the cab stand. Me and
16 Justin were having a conversation -- we were side by side having
17 a small conversation. Dusty was just, you know, five to eight
18 feet ahead of us, you know. You could tell it was a get in line
19 kind of wait. Cabs were coming and parking, and people were
20 loading. So we -- me and Justin, you know, kind of got in line.
21 It was two to three people wide and, you know, there was
22 anywhere from, I would say altogether maybe six to twelve
23 people, ten people there, you know. I guess when it's cold out,
24 a person is kind of hunched up just waiting your turn.

25 Q. And you said you left the entryway of Jokers along with

1 Justin and Dustin, is that correct, and a group of other people?

2 A. Yes.

3 Q. And you were having a conversation with Justin at this time
4 as you were walking to the cab stand; is that right?

5 A. Yes. I can recall being right next to Justin walking across
6 the street.

7 Q. Where was Dusty at the time?

8 A. He was just ahead of us five to eight feet.

9 Q. And was he also walking across the street to the cab stand?

10 A. Yes, he was.

11 Q. Prior to the time that you're making your way over to the
12 cab stand, did you know a Breanna Hunemiller?

13 A. No, I didn't.

14 Q. Ever talk to her before?

15 A. No.

16 Q. Do you remember ever seeing her before?

17 A. No.

18 Q. So tell us what happens as you make your way and approach
19 the cab stand.

20 A. As I say, me and Justin, as we're walking with the group of
21 people getting in line, we're kind of having a chitchat, and the
22 next thing I know I could hear Dustin's voice. I looked a
23 little bit forward and off to my right, and I just see Dustin
24 saying -- you know, I caught his voice first, but I could hear,
25 "What are you doing?" and "You can't do that to her." And

1 that's what caught my attention first.

2 Q. Okay. And as you're approaching the cab stand, you

3 mentioned there were other people already standing there at the

4 cab stand; is that correct?

5 A. Yes.

6 Q. Did you notice anything out of the ordinary going on at the

7 cab stand at the time?

8 A. No, I did not.

9 Q. All right. Was there any shouting or profanity or commotion

10 going on at the time when you first approached?

11 A. No.

12 Q. Did you hear anyone or see anyone being unruly or mouthing

13 off to any police officers as you approached the cab stand?

14 A. No. The only thing I heard was the words I just said Dusty

15 had said.

16 Q. Before you heard Dusty's voice, did you hear any commands

17 from any police officers?

18 A. No, I did not.

19 Q. And when you heard Dusty's voice, did you look over in the

20 direction of Dusty's voice?

21 A. Yes, immediately.

22 Q. And what did you see Dusty doing?

23 A. Like I said, he -- obviously his voice caught my attention,

24 so I turned up to look. And, like I said, I seen his arms were

25 in, like, disbelief, and he was, like, "What are you doing?" or

1 "You can't do that to her," and that's what caught my attention.

2 Q. And so you're indicating as you're answering, when he's

3 asking, "What are you doing," like in disbelief, was his arm up

4 to his side like that?

5 A. Yes.

6 Q. Were his hands open or closed?

7 A. His hands were just as I've got them here (indicating).

8 THE COURT: Mr. Burnikel, one of the things also is

9 that, for the record, you had your arms out and you had your

10 hands open. The question was, were his hands in a fist or open,

11 and you gestured to respond. But so that the record is

12 accurate, if you could answer in words when you can, I would

13 appreciate it.

14 THE WITNESS: Okay. Sorry, Your Honor.

15 MR. SWAIM: Thank you, Your Honor.

16 BY MR. SWAIM:

17 Q. Were his arms or hands open and to his side?

18 A. Yes, they were.

19 Q. And how high to the side were they? Were they at his waist

20 level, at his shoulder level? Where were they?

21 A. They were bringing between his waist and his -- a little

22 higher than his waist but lower than his shoulders.

23 Q. Did you see what was going on that caught Dusty's attention,

24 caused him to say, "Hey, what are you doing, you can't do that"?

25 A. No, I did not.

1 Q. How far away do you think you were from Dustin Burnikel at
2 that time?

3 A. I was probably eight to twelve feet.

4 Q. And did you actually see the woman, Ms. Hunemiller, and what
5 was going on with her when Dusty was saying this, "What are you
6 doing?"

7 A. No, I did not. The group of people, you know, there was
8 two, three people between me and Dusty.

9 Q. Did you see to whom Dusty was making that comment to, "What
10 are you doing, you can't do that to her"?

11 A. Not initially when his voice caught my attention, no.

12 Q. When you first got to the cab stand, did you see any police
13 officers?

14 A. No, I did not.

15 Q. What happened next after you heard Dusty say, "What are you
16 doing, you can't do that" and you saw his arms up to his side
17 like in disbelief? What happened next?

18 A. The next thing I seen was a gentleman approaching him, and
19 he had his arm forward, and in seconds Dusty was getting maced.

20 Q. After Dusty said that, "What are you doing, you can't do
21 that" and you turned and saw him, did he move at all towards the
22 police officers?

23 A. No. His feet -- like I said, he was elevated, so I presume
24 he was on a curb or something, and he never moved from that
25 position.

1 Q. And you said -- how long between the time that Dusty said
2 that and the officer turned and maced him?

3 A. It seemed like just a few seconds, just like it all flowed
4 into one.

5 Q. And between that time, did you hear the officers make any
6 commands to Dusty?

7 A. No, I did not.

8 Q. What did Dusty do after being maced?

9 A. After he was maced, you could tell like it totally blinded
10 him, disoriented him. He kind of fell back and was just like he
11 was stumbling back, curled up into -- like a baby. I mean, he
12 just -- you could tell it just hit him like a ton of bricks.

13 Q. And do you know where Dusty got maced? Was it apparent from
14 his reaction?

15 A. I presume he was getting it in the eyes because he curled
16 his head down and, you know, wanted to block his eyes or wipe
17 them out.

18 Q. Did you hear any police officers give Dusty any commands
19 after he was maced?

20 A. All I remember is, after he was maced, he was stumbling
21 back, and an officer, one of the individuals, came around the
22 side of him and, you know, was trying to -- I don't know. He
23 come from -- one individual came up behind him, and the next
24 individual comes up and, you know, I'm watching this, and one
25 individual had his arms behind his back, and the other

1 individual has got an arm on his shoulder and with his other
2 hand multiple punches to the groin.

3 In the meantime, I'm obviously noticing in awe and
4 shock that this is not right, and so I'm trying to get my phone
5 out, you know, to video, do something. I see Dusty's face.

6 It's full of blood, so, obviously, quite a commotion. I walked
7 forward and asked, "What is all going on here" and got the reply
8 from one of the gentlemen, "If you don't back up, you're going
9 to get it too. And I just -- I just honestly couldn't believe
10 what I was seeing. I mean, there was -- there was no need for
11 it at all and -- sorry.

12 Q. How many officers were -- after Dusty was maced, did one
13 officer approach him or two?

14 A. Like I said, it's just like it happened so fast, and there
15 was, you know, that small group of people there, but, obviously,
16 they immediately all disappeared. But in the time I seen him
17 maced and I seen one individual come to him, it seemed like the
18 second one was right there within seconds, I would say.

19 Q. And at that point, was Dusty standing up? Was he down? Was
20 he --

21 A. He just -- sorry. He was just curled, curled forward. I
22 mean, the guy, you could tell, like I said, the Mace did its
23 job. It disorientated him, looked like it made him numb, like
24 he couldn't do nothing.

25 Q. And you said you saw one officer holding his arms back; is

1 that correct?

2 A. Yes.

3 Q. And another one was -- had an arm around him and then was
4 punching him; is that correct?

5 A. Yes.

6 Q. And did you see where that officer was punching him?

7 A. Yes. I seen him punching him in the groin numerous times.

8 Q. Did it appear to you as though Dusty was resisting or
9 struggling with these officers?

10 A. No, it did not.

11 Q. Did you hear the police officers make any commands to Dusty
12 to put his hands behind his back?

13 A. I did hear them say put your hands behind your back, but
14 they were already behind his back because one of the individuals
15 was already holding them there.

16 Q. And what was Dusty doing while the officers were striking
17 him?

18 A. He wasn't doing nothing.

19 Q. Did he at some point go down to the ground?

20 A. It looked like he wanted to, but with the one officer
21 holding his arms back, somewhat holding him until his knees
22 were -- almost wanted to fold down to the ground.

23 Q. And how exactly were they holding him up? Can you show us?

24 A. I would call it, it looked like a double chicken wing. They
25 had his arms like that (indicating), if that makes sense.

1 Q. So one of the officers was holding him in the chicken wing
2 that you just indicated. What was the other officer doing?

3 A. The other officer was doing the striking, had one of his
4 arms kind of up on his shoulder because Dusty is primarily
5 almost kneeled to the ground, so like his one left hand was on
6 Dusty's shoulder and striking him with his right fist.

7 Q. And what did you think about what you were seeing?

8 A. I couldn't believe what I was seeing. Like I said, it was
9 totally wrong. It was totally unnecessary. It was -- it was
10 completely unbelievable what I was seeing.

11 Q. You mentioned that you were so surprised by it that you were
12 trying to find your phone to take video of it; is that correct?

13 A. Yes, that is correct.

14 Q. And did you actually catch some of it on video, on your cell
15 phone?

16 A. Yes, I did catch some on video. Like I said, I was
17 trembling through trying to get the video on. It was an old
18 style flip phone, so --

19 Q. So did you end up getting the whole incident, part of it?
20 What did you catch?

21 A. I primarily just got a video of the ending, more or less
22 after he was cuffed and they were taking him in.

23 Q. Pretty much after the strikes had already been given to
24 Dusty?

25 A. Yes.

1 Q. But you did get your phone out and try to catch it on video,
2 and you at least got the ending; is that correct?

3 A. Yes.

4 Q. Did the officers put Dusty in handcuffs?

5 A. Yes, they did.

6 Q. What happened next after they put him in handcuffs?

7 A. He was laying down on the ground in handcuffs, kind of down
8 on his knees with his chest down towards the ground, and they
9 literally, when I seen him, just went to pick him up by the
10 handcuffs. And you could see his arms flex way back, and I
11 heard him scream, and I thought, geez, they just tore his
12 shoulder muscle off or something. They let him back down and
13 were pulling him back up again to get him to walk because he
14 wouldn't have been able to -- nobody on his own could probably
15 stand up.

16 Q. Did you hear Dusty say anything other than "What are you
17 doing? You can't do that to her" to the officers?

18 A. After I heard that, the only thing I heard next was when
19 they asked him to put his hands behind his back, and he said,
20 "They already are. I can't." And that's when they had him
21 restrained.

22 Q. And after they did eventually get him handcuffed and picked
23 up off the pavement, what did they do with him?

24 A. They walked him to this van.

25 Q. And did you see Dusty and his face before the officers put

1 him in the van?

2 A. I could tell it looked bloody.

3 Q. And what did his face look like?

4 A. It looked -- you could tell he received some punches to the
5 face. He had blood. His face had some swelling, his lips, his
6 eyes, you know, just looking towards them was obviously burnt by
7 the Mace.

8 Q. You mentioned that the officers, after they had Dustin
9 handcuffed, they let him back down. Did they drop him? Did
10 they lower him down gently? How did he go back down to the
11 ground?

12 A. I recall when they went to pick him up the first time and he
13 screamed because, you know, his arms were being pulled
14 backwards, they -- yeah, they let go of the tension, and he
15 slooped down, and then they got him up again.

16 Q. And what did you do after the officers placed Dustin in the
17 van?

18 A. There was -- there was a cab there. We got in the cab, went
19 back to the Embassy Suites. I immediately talked to Dustin's
20 father and told him the situation and Dustin's sister. His
21 father was very upset. You know, I was trying to explain all of
22 this, and I'm sure it was a lot to take in for him. And I also
23 proceeded to call the sheriff's department or the police
24 department. I had no idea where Dusty was headed or going. I
25 was worried about, you know, his health. You know, I had no

clue what was going to happen to him.

MR. SWAIM: Thank you.

Nothing further.

THE COURT: Cross-examination?

CROSS-EXAMINATION

BY MR. HARALDSON:

Q. Is it possible, Mr. Burnikel, that you might have missed some of the events between Dustin and the police officers because, like a lot of us, you were trying to make your stupid phone work?

A. I witnessed very vividly the punches to the groin.

Q. Right. But you were -- at some point you were trying to, you said, you know, there was something compelling you to try and take a video of it. So you must have spent some time trying to get your -- and you said you missed a lot of video you could have taken just trying to get the phone to work; right?

A. The problem I was having was flipping between video and picture, and I think I double hit the record button when I thought I was recording, and it started and stopped it, you know, immediately.

Q. That's cell phones for you.

A. Right.

Q. But you must -- sometime during this event, you must have had to look at your phone to try and make it work; right?

A. Yes.

Q. And the video that you did get, is it fair to say that you sort of captured the moment that he was finally put in -- that he was sort of secured in handcuffs to the time in which he was walking, being walked to the van?

A. Yes.

Q. So there wasn't some handcuffing moment that you missed in that video up to the point where he's talking towards the van?

A. Could you say that again?

Q. Well, let's put it this way. Was there any significant aspect of the handcuffing that you didn't record? In other words, you said that he was dropped for a moment. Was that recorded by you, the moment of that drop?

A. Yes. The part where they dropped him, yes, he was handcuffed, and he immediately screamed when they went to lift him.

Q. And you caught that on video?

A. Yes.

Q. He was never dropped onto his face, was he?

A. They said they let him down. He slooped down because he screamed.

Q. All right. But he never -- after he was handcuffed and being taken back to the van, even when he slooped down, he didn't hit the concrete with his face, did he?

A. I don't recall that, not when he was handcuffed.

Q. All right. So if there's testimony that, in the process of

1 being escorted in handcuffs to the van, that he was dropped and
2 he was dropped on his face, that's not your recollection, is it?

3 A. Not mine, no.

4 Q. And you were recording that moment that that drop -- that he
5 had that drop on your phone; right?

6 A. I believe what I recorded was from -- when he was handcuffed
7 and when they lifted him.

8 Q. Right.

9 A. And he screamed, and they let him go back down. I think
10 that was about it.

11 Q. And you caught that moment on your phone; right?

12 A. Yes.

13 Q. Now, I believe that -- do you recall -- I believe your
14 testimony is that Dustin was a little higher -- you saw Dustin
15 because he was a little higher than everybody else; right?

16 A. Correct.

17 Q. He said something which caused you to pay attention to him;
18 but when you noticed him, he was higher than everybody else?

19 A. Yes. He looked like he was standing on a curb of some sort.

20 Q. Right. And, in fact, there is a curb between the sidewalk
21 and the parking ramp; isn't that right?

22 A. Yeah, I do believe so.

23 Q. And that, in fact, was what Dustin was standing on? That's
24 why he was higher; correct?

25 A. I presume that's what it was, yes.

1 Q. Because that is about six to eight inches higher than the
2 sidewalk surrounding it; right?

3 A. Right.

4 Q. And he wasn't standing on a park bench?

5 A. No.

6 Q. So that's likely what he was standing on?

7 A. That's what I was presuming he was standing on, yes.

8 Q. Now, you said you couldn't see what was going on. There's
9 obviously then something going on then below Dustin that he was
10 yelling about. That's your recollection; correct?

11 A. Correct.

12 Q. So whatever was happening, is it your recollection it was
13 probably happening in the proximity of where Dustin was?

14 A. I presume it was -- you know, the way he was facing, it had
15 to be that direction, yes.

16 Q. So probably something around that curb that he was standing
17 on?

18 A. I did not know if it was two feet away or 40 feet away.

19 Q. But from the nature in which he was standing and yelling and
20 the position that you were at, you assumed at the time that it
21 looked like it was somewhere near him; right?

22 A. No, I really didn't know, have a clue what was going on.

23 Q. But, in any case, you're confident he was probably standing
24 on that curb between the sidewalk and the parking ramp?

25 A. Yes, by his elevated position.

1 Q. I believe you testified earlier that you were drinking beer;
2 is that right?

3 A. Yes.

4 Q. Okay. There's one thing that I'm curious about. There was
5 some testimony in the past that you -- someone recalled you were
6 drinking Captain and Coke. Is that something that you may have
7 been drinking at that time?

8 A. It's possible. I don't recall what exactly we were
9 drinking.

10 Q. Okay. So you may have been drinking Captain and Coke that
11 night? You don't have a specific recollection?

12 A. No, I do not.

13 Q. And are you experienced enough to tell us what a Captain and
14 Coke is?

15 A. Yes.

16 Q. What is it?

17 A. It's a mixed drink.

18 Q. It's a rum drink. Is it rum and Coke essentially?

19 A. Correct.

20 Q. And did I hear you right that you did hear the officers ask
21 Dusty or Mr. Burnikel -- I know you're both Mr. Burnikel, so I'm
22 going to say Dustin, okay?

23 A. Okay.

24 Q. You did hear the officers say to Dustin to put his hands
25 behind his back; right?

1 A. Yes.

2 Q. But what you're saying is that struck you as odd because his
3 hands kind of were behind his back; right?

4 A. It struck me odd because there was no way he could move his
5 hands. They were restrained.

6 Q. Restrained by what?

7 A. One of the gentlemen's arms.

8 Q. One of the gentlemen that was telling him to put his hands
9 behind his back?

10 A. I can't recollect which one was saying it. They were both
11 right on him.

12 Q. One of them was definitely telling Dustin, though, to put
13 his hands behind his back?

14 A. Yes.

15 Q. And that was before he was on the ground?

16 A. Which -- what time do you mean he was on the ground?

17 Q. Well, at some point Dustin went to the ground, right, with
18 the officers? I mean, you described when he was being
19 handcuffed he was on the ground, so he must have gone to the
20 ground at some point; correct?

21 A. After they struck him numerous times in the groin and
22 obviously in the face.

23 Q. He eventually went to the ground, though?

24 A. He kind of had his legs curled up on his knees and --

25 Q. But it was before this that at least one of the officers was

1 telling Dusty to put his hands behind his back?

2 A. It is when the one officer was striking him in the groin or
3 right along that.

4 Q. But my question is, he was standing at the time one of the
5 officers said, "Put your hands behind your back"?

6 A. I wouldn't really call it standing. He was hunched over,
7 knees half bent, with an officer -- with one of the individuals
8 having his arms restrained behind his back.

9 Q. So he wasn't standing erect, but he was standing on two
10 feet?

11 A. The way it really looked, I don't know if he would have been
12 able to stand on his feet without one of the individuals holding
13 him there.

14 Q. But he wasn't on the ground?

15 A. No. One of the individuals was holding him.

16 Q. Wasn't -- at the time that you saw Dusty on top of the
17 concrete rise to the parking ramp, you actually did see him
18 close to an officer, didn't you?

19 A. What I seen -- his voice caught my attention. I turned that
20 way. I could hear him say, "What are you doing, you can't do
21 this to her," and that's when I seen an individual approach him.

22 MR. HARALDSON: May I approach, Your Honor?

23 THE COURT: The witness or me?

24 MR. HARALDSON: The witness. Sorry.

25 THE COURT: Yes.

BY MR. HARALDSON:

Q. Mr. Burnikel, do you recall testifying at Dustin Burnikel's misdemeanor trial in 2013?

A. Yes.

Q. And if you could turn to page 124. It says that in the upper right-hand corner. I'm sorry.

A. Yep.

Q. Are you there?

A. Yes.

Q. All right. That's the beginning of your testimony at Dustin Burnikel's misdemeanor trial on May 13, 2013; correct?

A. Correct.

Q. And if you can turn further on in your testimony to page 138.

A. Okay.

Q. And I'm directing you at page 138, line 5. You were asked there that -- I'll just use the quote, and you can tell me the answer. "You testified you weren't near your cousin, Dusty, at the time that you saw him yelling to the officer?"

And your answer was?

A. "I was not right next to him, no."

Q. Okay. And then if you could just go down the page a little bit, to line 14, you were asked, "So it's fair to say that Dusty was over by the officer; 'yes' or 'no'?"

And your answer was?

1 A. "Yes."

2 Q. All right. So does that refresh your recollection where
3 Dusty was relative to an officer when you first observed him
4 yelling something that night?

5 A. I still never seen Dusty next to an officer. I never
6 recollected that. Yeah, I could say it's fair to say he was
7 over there because he was in the same direction probably.

8 Q. You said earlier he might have been 40 feet. He wasn't 40
9 feet away from an officer based on what you recall from that
10 night, was he?

11 A. Right.

12 Q. At the time that this incident began, I should say?

13 A. Right. I don't know if he was 10 feet or 40 feet.

14 Q. But that's what I'm asking. When you first observed this
15 moment begin, when Dusty is yelling something, you then see him
16 interact with these officers; correct?

17 A. I didn't see any interaction. I heard his words, and I seen
18 an individual come towards him and mace him. There was no
19 interaction, though.

20 Q. Well, and that individual was an officer?

21 A. I did not know that at the time.

22 Q. Well, you found it out soon enough, didn't you, when you saw
23 two individuals with Dustin, physically interacting with him and
24 they were police officers; correct?

25 A. They were dressed in black coats, black hats, black gloves.

1 Q. With patches on their shoulders; right?

2 A. I don't recall any patches.

3 Q. Well, in any case, one of those individuals that you saw
4 spraying the Mace was one of the individuals tussling with
5 Dusty; correct?

6 A. Correct.

7 Q. Okay. And when that individual -- you first noticed that
8 individual, that was shortly after you saw Dustin standing on
9 top of the parking ramp curve yelling something?

10 A. Would you say that again?

11 Q. When you first saw this individual reach out and mace or
12 pepper spray Mr. Burnikel, that was shortly after you saw him
13 yelling something on top of the parking ramp curb?

14 A. Correct.

15 Q. So it's likely that that individual and Dusty were close to
16 each other when Dusty was yelling, isn't it?

17 A. It could be fair to say that.

18 Q. Okay. Now, if I understand, you may have had five beers or
19 five drinks of some kind between the Embassy Suites when you get
20 back at 10:30 to 11:00 and when you're told that the Bait Shop
21 was closing about 1:30, 1:45?

22 A. Yes.

23 Q. Is that right?

24 A. Correct.

25 Q. But you did not think that you were feeling the effect of

1 those drinks; is that right?

2 A. Correct.

3 Q. And your recollection is that Dusty had the same number of
4 drinks at the Bait Shop that you did, and your recollection is
5 three?

6 A. Yes, at the Bait Shop.

7 Q. And I'm guessing that Mr. Sovereign probably was the same
8 number?

9 A. Correct.

10 Q. You were sort of -- you sort of drank your beer and finished
11 your beer at the same rate and ordered another round until you
12 both had three?

13 A. Correct.

14 Q. And your testimony is that there were people between you and
15 Dusty; right?

16 A. Correct.

17 Q. And were these people sort of -- were you sort of
18 approaching the curb when you noticed -- you and Justin were --
19 that's a really bad question. Let me start over.

20 You and Justin were sort of talking to each other,
21 sort of absorbed in your conversation, when you noticed Dusty
22 yelling. You were sort of not paying attention so much to what
23 was going on around you. You were paying attention to what the
24 two of you were talking about; right?

25 A. Right.

Q. And then all of a sudden you saw Dusty on top of the ramp in the parking -- by the parking garage yelling something, and that drew your attention?

A. Correct.

Q. But you didn't really see how Dustin came to be in that spot, did you?

MR. SWAIM: Asked and answered, Your Honor.

THE COURT: The objection is sustained.

BY MR. HARALDSON:

Q. When you first noticed this, where were you relative to the street or the sidewalk? What were you on?

A. We were on the sidewalk.

Q. On the same side as the parking ramp?

A. Yes.

Q. Okay. Were you walking south to north then? Is that the direction you were headed?

A. I'm not familiar with Des Moines, but I'm guessing we were walking north.

Q. Were you going in a straight line across the street from Jokers to the parking ramp?

A. Correct.

Q. Now, you said that there were people -- that my clients were dressed in black that night; but you did assume that they were security of some sort, didn't you?

A. I would assume they were some sort of security maybe.

1 THE COURT: Mr. Haraldson, have you completed your
2 examination?

3 MR. HARALDSON: I believe I have, Your Honor.

4 THE COURT: Thank you.

5 Redirect?

6 MR. SWAIM: Yes, Your Honor. I'll be real brief.

7 THE COURT: Thank you.

8 REDIRECT EXAMINATION

9 BY MR. SWAIM:

10 Q. Mr. Burnikel, when you were at Bait Shop, you weren't
11 keeping track of Dustin's drinks or Justin's drinks, were you?

12 A. No, I really wasn't.

13 Q. You know how many drinks you had; correct?

14 A. Correct.

15 Q. And you assume that you all had probably around the same; is
16 that correct?

17 A. Correct.

18 Q. Mr. Haraldson asked you some questions about your testimony
19 in the criminal trial about how far away Dusty was from the
20 officers.

21 Do you remember that?

22 A. Yes.

23 Q. Is it fair to say your testimony is that Dusty was closer to
24 the officers than you were; is that correct?

25 A. Correct.

1 Q. You just don't know how close Dusty was to the officers, do
2 you?

3 A. I have no idea how close he was.

4 Q. Okay. But you saw the officers move towards Dusty after
5 Dusty asked, "What are you doing"; is that correct?

6 A. Correct.

7 Q. Dusty didn't move towards the officers; is that correct?

8 A. No. His feet never left the curb.

9 Q. When the officers asked Dusty to put his hands behind his
10 back, where were Dusty's hands?

11 A. They were being restrained more or less behind his back.
12 His arms were being restrained.

13 Q. Was it possible for Dusty to move his hands?

14 A. No. That's why I thought how can you ask him to do that
15 when there's no way he could.

16 MR. SWAIM: Your Honor, we would just ask to publish
17 the videos that are A exhibits, and then we'll be done.

18 THE COURT: Yes.

19 THE CLERK: Is it plugged in?

20 MR. KHAZAEI: It is.

21 THE CLERK: It should come up.

22 MR. SWAIM: Mr. Burnikel, if you would watch the
23 video.

24 THE COURT: Again, he has a screen right in front of
25 him.

MR. SWAIM: Oh, okay.

(Plaintiff's Exhibit 17, a video, was played.)

BY MR. SWAIM:

Q. Is this the video that you took, Mr. Burnikel?

A. Yes.

Q. And I'm about to show you a second video, Mr. Burnikel.

(Plaintiff's Exhibit 18, a video, was played.)

BY MR. SWAIM:

Q. And, Mr. Burnikel, are those two videos that you took on your cell phone?

A. Yes.

MR. SWAIM: And for the record, Your Honor, those were Exhibits 17 and 18.

THE COURT: Thank you.

MR. SWAIM: No further questions.

THE COURT: Recross limited to redirect?

You don't have to use it.

MR. HARALDSON: Yeah. If -- Justin, if you could play the first video again, and I'm just going to ask you to pause it at one point.

So, Mr. Burnikel, if you could just watch that.

THE COURT: And for the record, this is 17?

MR. SWAIM: Correct, Your Honor.

(Plaintiff's Exhibit 17 was played.)

MR. HARALDSON: I'm not going to ask you about this

1 part.

2 If you could stop it right there, Justin. There you
3 go.

4 RECROSS-EXAMINATION

5 BY MR. HARALDSON:

6 Q. All right. So, Mr. Burnikel, that is -- would you agree
7 that that's sort of the end point where the handcuffs are being
8 placed on Dustin Burnikel?

9 A. Yes.

10 MR. HARALDSON: Okay. If you could play it a little
11 bit further.

12 (Plaintiff's Exhibit 17 was continued to be played.)

13 MR. HARALDSON: Stop.

14 BY MR. HARALDSON:

15 Q. We just saw what looked to me like a patch on the shoulder.
16 Did you see that?

17 MR. HARALDSON: If you could play it a little further,
18 I think it will show up again.

19 (Plaintiff's Exhibit 17 continued to be played.)

20 MR. HARALDSON: Stop.

21 BY MR. HARALDSON:

22 Q. All right. Do you see that patch on the right arm?

23 A. Yes.

24 Q. Would you agree that that's a patch?

25 A. It's a patch.

1 Q. Would you agree it looks a lot like that patch (indicating)?

2 A. I can't with this video. It's a patch, yes.

3 Q. But based on your recollection, you don't remember whether
4 the officers had patches on their shoulders that night?

5 A. I said they were dressed in black, and they weren't
6 obviously dressed as they are today.

7 Q. They weren't dressed as they are today?

8 A. They didn't have no badge on or equipment belts or --

9 Q. What -- at what point -- has the situation already -- you
10 say from this video it's your recollection Dustin never -- his
11 face never hits the ground after they pick him up; right?

12 A. Not on the video here it doesn't.

13 Q. And they never -- after he was in handcuffs -- and this is
14 the full moment that you recorded, from your recollection, for
15 the time he was put in handcuffs until the end of this video
16 where he's walking on two feet with the assistance of the
17 officers; right?

18 A. That's my video, yes.

19 Q. Okay. There's no -- there's nothing we're seeing in the
20 video here that you recall, outside of the video, where
21 Mr. Burnikel in handcuffs was dropped on his face by the
22 officers; right?

23 A. He was in handcuffs prior to this part of the video, yes.

24 Q. Well, I just asked you a few moments ago whether what we're
25 seeing at the very beginning, once it's in focus a little bit,

1 was the end point where he was finally put in handcuffs, and I
2 believe your testimony was correct. Are you changing that
3 testimony?

4 A. Ask that -- I don't know what you're really trying to ask
5 here.

6 Q. All right. All I'm asking is, did you videotape the point
7 where Dustin is finally put in handcuffs to where he's walked to
8 the van? That's what this 42-second video captures; right?

9 A. Yes. I took this video. But do you believe he was
10 handcuffed prior to this video?

11 Q. No. I'm just asking -- that's actually the opposite of what
12 I'm asking.

13 A. Okay.

14 Q. He was -- this was the point -- you videoed the point where
15 he was finally put in handcuffs; right?

16 A. Yes, he's in handcuffs.

17 Q. He wasn't in handcuffs before the moment that you captured
18 it on video?

19 A. That's what I'm trying to ask you, if you think he was
20 handcuffed on video or --

21 THE COURT: Mr. Burnikel, one of the roles of the
22 witnesses is to provide the facts. The role of the attorneys is
23 to provide the questions. So the questions that have been posed
24 to you need to be based upon what your knowledge is and what
25 your understanding is, not what Mr. Haraldson thinks the facts

1 are. So the question that he posed to you was, was he
2 handcuffed before you started recording.

3 Do you understand that question?

4 THE WITNESS: Yes.

5 THE COURT: And do you have an answer to that
6 question?

7 THE WITNESS: Yes. Sorry, Your Honor, for that.

8 THE COURT: And your answer is?

9 THE WITNESS: Yes.

10 THE COURT: Okay.

11 BY MR. HARALDSON:

12 Q. He was handcuffed prior to the beginning of this video?

13 A. That's the way I see the video as.

14 Q. Okay. Was he ever moved around by the officers in the
15 handcuffs before this video?

16 A. I can't recall that.

17 Q. And just going back to your previous testimony, you don't
18 recall him ever being dropped on his face --

19 MR. SWAIM: Your Honor, this is beyond --

20 BY MR. HARALDSON:

21 Q. -- by the officers?

22 MR. SWAIM: This is beyond the redirect.

23 THE COURT: Well, you played the video, so -- I mean,
24 you played it during your redirect, which allows for this. But
25 I do think that we've well covered this ground, Counsel.

1 MR. HARALDSON: Okay.

2 BY MR. HARALDSON:

3 Q. Just to make it short, the answer is no, he had not been
4 dropped? He was never dropped on his face while in handcuffs,
5 correct, that you saw?

6 A. Not that I saw.

7 MR. HARALDSON: Thank you.

8 That's all I have.

9 MR. SWAIM: Nothing further, Your Honor.

10 THE COURT: Thank you.

11 Mr. Burnikel, you may step down.

12 THE WITNESS: Thank you.

13 THE COURT: Members of the jury, it is 4:42. I told
14 you at the beginning of the day that typically we end at 4:30.
15 As you saw until -- I don't want to break testimony in the
16 middle if there's only a few minutes left --

17 You may be excused, sir.

18 (Witness excused.)

19 THE COURT: And so this is what you can expect. We
20 will generally stop between 4:30 and 5 o'clock, but the Court
21 will allow the testimony to come in so that we can use
22 everybody's time efficiently.

23 I want to talk with you a little bit about what's
24 going to happen now. You're going to go home and your friends,
25 your family members, your co-workers will call you or post

1 something on whatever social media you use, and they might ask
2 you what you've done today. You might be tempted to say, I'm in
3 a jury trial, I'm a juror, it's really cool, I'm enjoying
4 hearing about this. You cannot do that. You cannot do that
5 because that post may elicit responses from other people that
6 would infect the process of a fair and impartial jury trial.

7 You can tell your family members or loved ones that
8 you are -- you've been selected to serve on a jury and that the
9 jury trial is expected to go between five and seven days, not on
10 Thanksgiving Day and the day after Thanksgiving, in case anyone
11 is concerned about that. But you really can't say anything
12 more. You can't talk about the allegations. You can't talk
13 about the parties. You can't talk about the judge. You can't
14 talk about the attorneys. And when I say "talk," I mean post,
15 Tweet. I don't know what there is out there, but whatever it is
16 that you do, you can't. And that's to make sure that everyone
17 involved in this trial has a fair trial based upon the evidence
18 presented in court and the instructions of the Court.

19 Now, if someone pushes back on you and says, tell me
20 something about this, you're a juror, you need to blame me and
21 you need to say that the Court told me that I could not do this
22 and that I would get in trouble if I did, and that is true.
23 After the end of trial, you will be able to tell people about
24 your experience, but you cannot at this point.

25 The reason why I have said this repeatedly today is

1 because in our current day and age, people don't do anything
2 without Instagramming it or Facebooking it or posting it on your
3 family blog. And this is something you cannot do, and the
4 reason why I have repeated it and the reason why I'm repeating
5 it here at the end of the day is so that you understand just how
6 important it is.

7 I will ask you all to be here tomorrow between 8:30
8 and 8:45. We'll get started as soon as we can. Again, between
9 8:45 and 9 o'clock in the morning.

10 Please continue to remember the admonition of the
11 Court. I'll ask you to confirm with Ms. Berg who you are and
12 where you're sitting so that we have an accurate record of where
13 everyone is, and you can leave your notebooks on your chairs.

14 Thank you very much for your service. We'll see you
15 tomorrow morning.

16 We'll be in recess.

17 (In open court, out of the presence of the jury.)

18 THE COURT: Please be seated.

19 Anything on behalf of the plaintiff before we stop for
20 the day?

21 MR. KHAZAELI: The only thing, Your Honor, is we don't
22 have any intention on calling back Mr. Darrick Burnikel or
23 Ms. Hunemiller. Considering how far away they live, we would
24 like the Court's permission to release them.

25 THE COURT: Mr. Haraldson, any objection to releasing

1 those witnesses?

2 MR. HARALDSON: I don't plan on calling them, so no.

3 THE COURT: Okay. Thank you. Then they can be
4 released.

5 MR. KHAZAEI: Thank you, Your Honor.

6 THE COURT: Anything further on behalf of the
7 defendants?

8 MR. HARALDSON: No, Your Honor.

9 THE COURT: So, some of my colleagues have recently
10 been experimenting with putting attorneys on a clock. That
11 means that we say to you how much time do you need and then we
12 keep you to that. It has been my colleagues' experiences that
13 this has resulted in very efficient presentation of evidence. I
14 am not doing that right now. I want you all to be aware that
15 that has been the practice in some of my colleagues' cases in
16 the Southern District of Iowa, and that is something that I will
17 consider doing if people are not thoughtful in the manner in
18 which they present their evidence, whether it be direct or
19 cross-examination.

20 You all are good attorneys. You all know how to try a
21 case. Please do so in a way that uses everyone's time wisely,
22 particularly in light of the fact that we're sandwiched between
23 two holidays and we need to make sure that we're thoughtful
24 about people's time.

25 Do you anticipate having a full day of witnesses

1 tomorrow, Counsel?

2 MR. KHAZAELI: Yes, Your Honor.

3 THE COURT: And as I've explained to you before, along
4 the same vein of being efficient, you need to be sure that you
5 have witnesses here and ready to go so we don't have any
6 unexpected downtime.

7 MR. KHAZAELI: Yes, Your Honor. We're communicating
8 with them.

9 THE COURT: Thank you.

10 Anything else we need to address? I'm sorry about the
11 technical issues. It appears to be an issue with the connection
12 with your computer. That seems to be resolved.

13 MR. KHAZAELI: Yes, Your Honor. Luckily your IT staff
14 had other options or we went old school, to the old school plugs
15 because the new advanced one is loose and broken on the panel;
16 but it seems to be working.

17 THE COURT: Okay. Great.

18 Anything else before we break for the day?

19 MR. HARALDSON: Not from the defendants, Your Honor.

20 MR. KHAZAELI: No.

21 THE COURT: Okay. I'll expect you all to be here at
22 8:30. I'll expect you to bring anything to my attention that
23 you need to bring to my attention at that time. If there's
24 nothing that we need to do, we'll get started with the jury as
25 soon as we can.

Thank you. We'll be in recess.

(Recess at 4:48 p.m. until 8:30 a.m., Wednesday,
November 14, 2018.)